

November 27, 2001

TO:	Board of Governors	Board authority to include credit insurance premiums in the points and fees trigger under the Home Ownership and Equity Protection Act of 1994 (“HOEPA”)
FROM:	Legal Division (Messrs. Mattingly, Alvarez, and Hannah)	

SUMMARY: In its proposed amendments to the HOEPA rules, the Board proposes to include credit insurance premiums in the points and fees trigger. Commenters from the credit insurance industry contend that the Board lacks the legal authority to include such premiums in the points and fees trigger. It is the Legal Division’s view that the Board has discretion to include credit insurance premiums in the points and fees trigger so long as the Board determines that such inclusion is appropriate to carry out HOEPA’s purposes.

BACKGROUND: A mortgage loan is covered by HOEPA if (1) its APR meets or exceeds the APR threshold; or (2) the total points and fees payable by the consumer at or before loan closing exceed the greater of 8 percent of the loan amount or \$465.¹ For purposes of HOEPA, points and fees are defined to include (A) those items included in the finance charge under TILA (except for interest and time-price differential); (B) compensation paid to mortgage brokers; (C) any fees paid to affiliates of the lender for title examinations, appraisals, and similar items; and (D) “such other charges as the Board determines to be appropriate.”²

¹ 15 U.S.C. § 1602(aa)(1). The dollar threshold for the points and fees trigger is adjusted annually to reflect changes in the Consumer Price Index, and for 2001 is \$465. 15 U.S.C. § 1602(aa)(3). The dollar threshold will be \$480 in 2002.

² 15 U.S.C. § 1602(aa)(4).

Credit insurance premiums do not fall within parts (A) through (C) of this definition of points and fees. In fact, by statute, these premiums are excluded from the TILA finance charge if it is disclosed in writing to the consumer that credit insurance is not a prerequisite for approval of the loan, and the consumer indicates in writing that she desires the insurance coverage after its cost has been disclosed.³ Thus the issue becomes: Under what circumstances may the Board act under part (D) of this definition to include single premium credit insurance in the points and fees trigger?

Of the roughly 1300 comments received about the HOEPA proposal, approximately 120 opposed inclusion of credit insurance premiums in the points and fees trigger. Some of these comments stated that including credit insurance premiums in the points and fees trigger would result in coverage by HOEPA of most if not all mortgage loans with single premium credit insurance. Some of the comments set forth interpretations of HOEPA's legislative history to argue (1) that the Board may include credit insurance premiums in the points and fees trigger only if the Board can show that the premiums are being used to circumvent or evade HOEPA's provisions; or (2) that the Board may not include these premiums in the points and fees trigger so long as the disclosures are made that exclude these premiums from the finance charge under TILA.

ANALYSIS: *1. The statute unambiguously gives the Board discretion to include credit insurance fees in the points and fees trigger.* Judicial review of any Board interpretation of HOEPA would begin with a court's consideration of whether the statutory provision at issue is ambiguous.⁴ In the present instance, the Board can mount a strong argument that, based on accepted principles of statutory

³ 15 U.S.C. § 1605(b).

⁴ Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984)

construction, the statute unambiguously affords the Board discretion to include items such as credit insurance premiums in the points and fees trigger. The words of the statute seem clear: even though credit insurance premiums are not on the roster of items included in points and fees under parts (A) through (C) of HOEPA's definition, there is no restriction under part (D) of the definition of the Board's ability to include "such other charges as the Board determines to be appropriate."

It is a principle of statutory construction that the same words used in the same statute have the same meaning, whereas different terms in the same statute have different meaning.⁵ The language Congress used in HOEPA's points and fees definition ("points and fees are to include . . . such other charges as the Board determines to be appropriate") is similar to other provisions of TILA in which Congress granted the Board broad latitude to, for example, make such recommendations to Congress "as the Board deems necessary or appropriate" and require certain types of disclosures in certain types of formats "to the extent the Board determines to be practicable and appropriate."⁶ In contrast, when Congress wanted to limit the Board's discretion in administering certain parts of HOEPA, it knew how to do so: Congress provided that the Board may exempt specific mortgage products or mortgage categories from HOEPA's prohibitions only if "the Board finds that the exemption (A) is in the interest of the borrowing public; and (B) will apply only to products that maintain and strengthen home ownership and equity protection."⁷

⁵ Statutes and Statutory Construction, 6th ed., § 46.06 at 193-194.

⁶ 15 U.S.C. §§ 1613, 1632.

⁷ 15 U.S.C. § 1639(l)(1).

2. *The Board's inclusion of credit insurance premiums in the points and fees trigger is based on a reasonable interpretation of the statute.* If a court were to determine that the grant of authority in part (D) is ambiguous, the court would still uphold inclusion of credit insurance premiums in the points and fees trigger so long as the court determined that the Board's action was based on a reasonable reading of the HOEPA statute.⁸ The court need not find that the Board's interpretation is the interpretation that court itself might adopt, but only that the Board's interpretation is reasonable.

Consistency with other provisions of TILA. Opponents of inclusion of credit insurance premiums in the points and fees trigger cite legislative history stating that Congress intended "that credit insurance be treated consistently with the current provisions of the Truth in Lending Act."⁹ As noted, the TILA statute excludes credit insurance premiums from the TILA finance charge when the consumer receives written disclosure that credit insurance is not a prerequisite for approval of the loan, and the consumer indicates in writing that she desires the insurance coverage after its cost has been disclosed.¹⁰ Opponents contend that, to ensure consistency in treatment, credit insurance premiums may be included in the points and fees trigger only when disclosures are absent and the premiums therefore are included in the TILA finance charge.

Had Congress intended this result, it could have written the HOEPA statute to make its intent clear. For example, Congress could have declined to

⁸ Chevron, 467 U.S. at 842-843.

⁹ August 9, 1994 Congressional Record, at S11043 (colloquy of Sen. Mack and Chairman Riegle during Senate floor consideration of the conference report on HOEPA); March 16, 1994 Congressional Record, at S3044 (stating that managers' amendment offered during Senate consideration of HOEPA "treats credit insurance consistently with other sections of the Truth in Lending Act.")

¹⁰ 15 U.S.C. § 1605(b).

grant the Board discretion to include other charges in the points and fees trigger. Alternatively, Congress could have granted the Board such discretion except with respect to premiums for credit insurance for which a customer receives disclosures. That Congress chose not to do so in HOEPA makes the interpretation offered by opponents far from conclusive, however.

Instead, it is reasonable for the Board to read this legislative history as indicating Congress's intent that, as a general matter, credit insurance premiums are to be excluded from the points and fees trigger so long as the premiums are excluded from the finance charge under TILA – and that the premiums may be included in the points and fees trigger only if the Board finds, under its discretionary authority under part (D), that inclusion of the premiums in the HOEPA triggers is appropriate. Additionally, note that any action by the Board to include credit insurance premiums in the points and fees trigger would not change the treatment of credit insurance premiums with respect to TILA's finance charge.

“Circumvention and Evasion” arguments. Opponents of including credit insurance premiums in the points and fees trigger also cite an excerpt from a Congressional report:

The Federal Reserve Board has authority to include additional charges in calculating the triggers, such as credit insurance premiums, if evidence establishes that such charges are being used to circumvent or evade the provisions of this legislation.¹¹

Opponents read this passage as meaning that credit insurance premiums may not be included in the points and fees trigger unless the Board can demonstrate that these premiums are used to circumvent or evade HOEPA's provisions. That is, opponents argue that the threshold for including credit insurance premiums in the points and fees trigger is higher than would first appear from the words of part (D),

¹¹ H.Rept. 103-652, at 159 (HOEPA conference report).

which provide for including “such other charges as the Board determines to be appropriate.”

Here again the opponents’ interpretation, though it may be plausible, is not conclusive. Opponents seek to give equivalent meanings to different language in two different parts of TILA. The provisions of TILA granting the Board general TILA rulemaking authority permit the Board to make classifications and differentiations “as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], [or] to prevent circumvention or evasion thereof, . . .”¹² (emphasis added). In contrast, part (D) of HOEPA’s points and fees definition allows the Board to include any charge “the Board determines to be appropriate.” Had Congress intended HOEPA’s points and fees definition to carry the meaning opponents recommend, Congress could have used the words “circumvent or evade” to limit the Board’s authority to include additional charges in the points and fees trigger. That Congress did not use the same language in these two provisions of the same overall statute suggests that Congress intended two different things.

Moreover it is reasonable for the Board to read this legislative history as illustrative, rather than limiting. In other words, one circumstance in which the Board may include additional charges in the points and fees test is the circumstance in which a particular charge is used to evade HOEPA’s provisions. The legislative history does not mean that this is the only circumstance in which the Board may find it appropriate to add a charge to the points and fees trigger.

¹² 15 U.S.C. § 1604. In addition, a provision of HOEPA provides that the Board is to prohibit acts or practices in connection with “mortgage loans that the Board finds to be . . . designed to evade [HOEPA]”. 15 U.S.C. § 1639(l)(2)(A) (emphasis added).

Inclusion of charges in the points and fees trigger under other circumstances also is permitted if the Board deems it appropriate.

Appropriate as meaning “appropriate to carry out the purposes of the HOEPA statute.” The Board strengthens its legal posture when it exercises its discretion with respect to the points and fees trigger only in ways that further HOEPA’s purposes. The goals of HOEPA include ensuring that consumers understand the terms of mortgage loans with high interest rates or high upfront fees, and protecting consumers from high pressure sales tactics.¹³

When credit insurance premiums are financed in connection with a subprime loan, such charges can be significant additions to the amount financed. In addition, comments received and testimony presented at the HOEPA hearings indicate that some consumers who purchase credit insurance are not aware they are purchasing it. Adding credit insurance premiums to the points and fees trigger will bring many loans with single premium credit insurance within HOEPA,¹⁴ which in turn will require lenders to make the HOEPA-mandated disclosures at least three days prior to closing. This includes disclosure of the amount borrowed (which would include the amount of premiums financed), which is important information that will allow the customer to make an informed decision on the loan and insurance. In addition, the HOEPA-mandated disclosure that the customer may lose his house if he fails to make payments that include the financed insurance premiums may help counteract aggressive sales practices.

¹³ H.Rept. 103-652, at 158 (conference report); S.Rept. 103-169 (Senate committee report).

¹⁴ As a practical matter, including single premium credit insurance in the points and fees trigger will only affect loans with respect to which the premium (when combined with other points and fees) represents a high percentage of the loan amount (more than \$465 for loans of \$5,812 or less; more than 8 percent of the loan amount for loans of more than \$5,812).

CONCLUSION: There is a reasonable basis for interpreting the HOEPA statute as permitting the Board to include credit insurance premiums in the points and fees trigger if the Board determines that so doing would be an appropriate method of furthering HOEPA's purposes.