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April 20, 2004

VIA ELECTRONIC MAIL

Office of the Comptroller of the Currency
Communications Division
Public Information Room
Mailstop 1-5
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Jennifer J. Johnson
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Board of Governors of the Federal Reserve System
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Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
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Office of Thrift Supervision
Regulation Comments
Chief Counsel's Office
1700 G Street, NW
Washington, DC 20552

Re: Burden Reduction Recommendations
OCC Docket No. 04-05
FRB Docket No. R-1180
OTS Docket No. 2003-67

Ladies and Gentlemen:

I write on behalf of low-income homeowners to submit comments on burden of consumer protection lending-related rules. Land of Lincoln Legal Assistance Foundation, Inc. is a federally funded legal services provider, serving low income individuals, families, and community groups in 65 counties in southern and central Illinois. I have worked in the East St. Louis office since 1994, primarily representing homeowners threatened with foreclosure. For five years, I also served as corporate counsel for the largest nonprofit provider of affordable homeownership opportunities in East St. Louis. I currently serve as a member of the Consumer Advisory Council of the Board of Governors of the Federal Reserve System.

I am concerned that the request for comments unnecessarily restricts review to lender's concerns about the cost of compliance with the regulations without inquiring in to the benefit provided to consumers individually and society more generally by the regulations. The Economic Growth and Paperwork Reduction Act appears to contemplate a more-wide ranging review than that solicited in the Request for Comments; the Act requires the regulatory agencies to review regulations and laws, ". . . in order to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions."[1] We cannot know whether or not the regulations are unnecessary by only asking lenders what their costs are; most regulations are intended to provide benefits to consumers and society and to lenders only indirectly. Regulations may also be outdated and in need of strengthening rather than reduction.

As an advocate for low-income homeowners, I rely on a daily basis on many of these regulations to save my clients' homes. In no case would I say the regulations go far enough in terms of providing meaningful protection or redress to consumers. As matters stand now, for most consumers, lenders hold all the cards. Terms of loans are not negotiable; arbitration is imposed with an arbitrator of the lender's choice. Statutory damages are pitifully small for failure to provide required information.

The one consumer regulation with teeth is the extended right of rescission available under the Truth-in-Lending Act.[2] Much of my current practice consists of helping consumers exercise their extended rights to rescind as a defense to foreclosure. I would estimate that our office exercises this right to rescind on behalf of consumers at least 25 times annually. Several times a year, I talk to a homebuyer who wishes to exercise this right within the three-day cooling off period—either because they have received notice that it is a high cost loan or because they have otherwise had a chance to reflect on the cost of the loan. More often, I see homebuyers who were never provided with the correct and complete disclosures and wish to exercise their right during the extended three year period. Any concern about the need for a waiver of a rescission right is misplaced. The regulations already provide for waiver when there is a true emergency.[3] When there is no emergency, it is vitally important that consumers not jeopardize their homes, which for low-income Americans represents their only wealth and their entire hope for the future, on the basis of misinformation or a lender's failure to disclose.

Exercise of this rescission right and indeed of all consumer remedies has been made much more difficult in the past few years by the increase in securitization. Most mortgages are sold on the secondary market or are securitized. These loans are often transferred multiple times. There are several entities involved in these transfers—original creditors, servicers, multiple assignees, custodians, and trusts. The servicer is usually the only entity known to the homeowner because it collects the monthly payments, handles the escrow account for taxes and insurance, communicates with the loan holder, handles repayment plans if the homeowner gets behind, and hires an attorney to foreclose if that is necessary. Homeowners are not notified of changes in the ownership of their loan, and often assignments are not recorded or of public

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[1] 12 U.S.C. §3311(a).

[2] 15 U.S.C. §1635; 12 C.F.R. §226.15.
[3] 12 C.F.R. § 226.15(e).

record anywhere.[4] Although it is possible under Truth-in-Lending to ask for the name of the holder of the creditor,[5] servicers routinely refuse to do so. In all of the cases where we have asked for the name of the obligor under this provision of TILA, less than one in ten servicers have responded. None has responded in less than three months. Foreclosing attorneys do not always know who the holder of the note is and even when they do know, they often refuse to divulge that information. Figuring out what has happened to your loan or to the servicing rights of your loan can be a costly and time consuming nightmare, even before attempting to assert any defenses to collection or to demand an accounting. Even figuring out to whom to complain is unduly burdensome for consumers.

For a consumer attempting to exercise her right of rescission, even a consumer represented by counsel, it can be impossible to ascertain before the expiration of the extended rescission period the name and address of the current assignee. For most consumers and most lawyers attempting to exercise an extended right of rescission, the only available information is the name and address of the originating lender and the name and address of the current servicer. Lenders have no obligation to provide this information to consumers, and use the failure to provide this information as a shield when consumers attempt to assert their rights.[6] The Federal Reserve Board has provided at least a partial fix to this specific problem in rule making.[7]

This particular problem is illustrative, however, of the way the changing marketplace has made it increasingly difficult for consumers to exercise their rights, receive information, or negotiate for favorable terms. Instead of a free pass for lenders because of this changing marketplace, there is an urgent need to determine whether existing regulations adequately protect consumers.

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[4] The ability of the homeowner or her attorney to determine the true holder is even more complicated with the increasing use of "MERS," Mortgage Electronic Registration System. The MERS website describes itself this way:

> MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper. Our mission is to register every mortgage loan in the United States on the MERS® System. Beneficiaries of MERS include mortgage originators, servicers, warehouse lenders, wholesale lenders, retail lenders, document custodians, settlement agents, title companies, insurers, investors, county recorders and consumers. MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the nominal mortgagee no matter how many times servicing is traded.

http://www.mersinc.org/index1.htm. When MERS is the nominee, the consumer cannot determine the identity of the actual loan/mortgage holder from public records. MERS will appear in the land records. Further, any mortgage registered with MERS will never show the actual holder no matter how many times the mortgage is sold or transferred.

[5] 15 U.S.C. §1641(f)(2).
[6] In Miguel v. Country Funding Corp, 309 F.3d 1161 (9th Cir. 2002), the Ninth Circuit denied a homeowner's right to rescind because the borrower had sent the rescission notice to the servicer of the loan, not the current holder.
[7] 69 Fed. Reg. 16769 (March 31, 2004).

One particular concern of mine for several years has been the complete failure of the regulations to ensure adequate disclosures to consumers entering into adjustable rate mortgages. Most of the adjustable rate mortgages I see, entered into in the last several years, start with a floor interest rate of over 10%, which in turn is a teaser rate from the fully indexed rate of 12% or 13%. National lenders acknowledge that they do not underwrite these loans at the fully indexed rate, let alone at the maximum interest rate. Most of my clients cannot afford to and do not refinance within the initial two to three year period, and should rates ever rise, they will almost certainly find themselves facing foreclosure in a matter of months. None of my clients had any knowledge that they were signing an ARM; none knew how high their individual payment would go if fully indexed, or at the maximum rate. None received the <u>Consumer Handbook on Adjustable Rate Mortgages</u>. Thorough overhaul of the adjustable rate disclosures is needed, with real penalties for lenders who do not comply.

Without meaningful penalties for noncompliance, all the competitive incentives work against the common good. Lenders who comply are hurt, because borrowers are frightened away from their high cost ARMs. Lenders who do not comply prosper. And thus a race to the bottom is engendered, which ultimately benefits no one, except the most disreputable lenders. There are two solutions to problems of an uneven playing field: one is to lower the standards for everyone; the other is to hold everyone to the same standard.

Most lenders make some effort to comply with the rescission notice, because there are real penalties for noncompliance. Similarly, most lenders are careful with the HOEPA triggers, even if they are burdensome, because there are real penalties for noncompliance. In ten years representing hundreds of homeowners, I have never once seen a homeowner who had or had see a copy of the <u>Consumer Handbook on Adjustable Rate Mortgages.</u>

I thank the agencies for the opportunity to submit comments on these important issues. I urge the agencies to take this opportunity to review the societal cost and benefit of the individual regulations, as well as the cost and burden borne by the financial institutions, and I urge the agencies to examine the ways to make the existing regulations more meaningful and more beneficial.

Sincerely,
/s
Diane E. Thompson