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Sent: Wednesday, February 11, 2004 4:09 PM
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Subject: EGRPRA

Ladies and Gentlemen:

I am an attorney who has been working with financial institutions to assist in compliance with federal consumer lending regulations for more than 25 years. Although I believe that many of the regulations covered by the request for comment impose undue burdens and have little social utility, I have chosen to limit my comment to only one provision of one regulation in order to highlight what I believe to be an unbalanced assessment of the benefits provided by a regulation versus the burdens imposed by that regulation. The regulation on which I will comment is Section 226.23(c) of Federal Reserve Regulation Z, the requirement that lenders withhold performance until the rescission period has expired and the lender is reasonably confident that the borrower has not rescinded.

Many people, including senior regulators with whom I have spoken, are under the mistaken impression that withholding disbursement of funds is required under the Consumer Credit Protection Act. That is simply not the case. Title 15 Section 1635 of the United States Code includes no such requirement. Instead, the requirement is imposed in Regulation Z, and I urge the Federal Reserve to delete the requirement. Deletion is clearly justified as a matter of social utility. How many millions - yes millions - of borrowers have been inconvenienced by waiting three extra days to obtain the fruits of their mortgage refinance? How much effort has been spent by bankers, attorneys, title insurance companies and closing agents to "consummate" a transaction and then pick the transaction up four business days later just to disburse funds? How much wasted effort has been put into re-verifying the status of title at the end of the rescission period? How much extra money have borrowers been charged for such re-verification? How many dollars of extra interest have borrowers had to pay simply because they could not pay off a high rate loan with a lower rate refinancing until the rescission period expired? How many acres of forests have been destroyed printing forms of "acknowledgement of expiration of right to cancel" which are then faxed or delivered to the lender so that the lender is "reasonably satisfied" that the borrower has not cancelled? We could have all paid Mrs. Rodash's medical bills a thousand times over for the wasted money and effort that has gone into compliance with the delayed performance provision.

And what is the benefit of delayed performance? The cancellation of the security interest in the borrower's residence in the event of rescission is not "protected" if performance is delayed any more than if performance is immediate. The lender can cancel the mortgage or deed of trust after recording it, and the statute explains how. In fact, a careful reading of Section 1635 makes it appear that Congress contemplated performance prior to the expiration of the three day period. OTHERWISE, why would they have expended so much effort explaining how to unwind performance through a return by the borrower of property received? The only performance that I can see which is difficult to unwind is the payoff of a prior lien with the proceeds of a new loan, because there is a third party involved. The prior creditor takes the position that he or she does not have to participate in the unwinding. So instead of delaying performance for four business days for millions of transactions which are not rescinded, protect the isolated rescission by adopting a regulation requiring everyone receiving the proceeds of a covered loan to refund those proceeds if there is a rescission. And provide that the new lender subrogates to the former creditor's claim if the borrower rescinds until the former creditor disgorges the amount received. Then also adopt a rule against bad faith rescissions undertaken in order to cause a prior lender to delay a foreclosure sale or other remedy scheduled to occur between consummation and rescission. Maybe additional protection is needed in the case of the home improvement company that throws a little tar on the driveway and takes back a mortgage, because it is difficult for the borrower to give the tar back. But not in the case of a loan transaction in which the lender's performance is the disbursement of money.

If you look at litigation under 226.23 and Section 1635, you find that it is extremely rare that there is a bona fide rescission during the three day period. The primary use of rescission is in "convenient" late claims of

rescission asserted to defend against collection action when the lender makes an error in disclosure. In those cases, withholding performance is irrelevant, because the lender has released funds and the borrower claims that a late rescission is valid. Let's recognize the true facts and stop imposing a burden on millions of refinances for an illusory benefit to the one consumer who legitimately rescinds.

Jay Hack