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February 09, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
Washington, DC 20551
regs.comments@federalreserve.gov

Re: Docket No. R-1340
Proposed Rule; Amending Early Disclosure Provisions
Under Regulation Z; Truth in Lending

Dear Ms. Johnson:

The American Bankers Association[1] appreciates this opportunity to comment on the Federal Reserve Board's Proposed Rule amending the early disclosure provisions under Regulation Z, which implements the Truth in Lending Act (TILA).

ABA considers that the proposed changes to Regulation Z are generally consistent with the recent legislative amendments set forth by the Mortgage Disclosure and Improvement Act of 2008 (MDIA). ABA believes, however, that the recommendations set forth in this letter would enhance the regulatory system and the delivery of mandated disclosures to mortgage shoppers. The comments below describe three important technical issues that the Board should address in any final rule—

(1) Addition of a presumption that would protect creditors in instances where individuals choose to rely on a personal financial emergency to waive the waiting period.
(2) Inclusion of a clarification that consumers are deemed to receive disclosures one day after sending them through electronic communication means.
(3) Inclusion of a waiver of any waiting period in instances of over-disclosures of the APR, consistent with other Regulation Z provisions.

ABA also urges that the Board maximize the consumer benefits of these changes by coordinating all changes with the Department of Housing and Urban Development.[2]

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

Regulatory Burdens

ABA members thank the Board for its continuous efforts to improve the Regulation Z provisions, especially in terms of adding clarity and ensuring efficiency with regards to implementation. The Board's efforts are particularly important in light of the intense level of regulatory and legislative activity that we are likely to see in the coming months. ABA understands that the unprecedented turmoil in the nation's credit markets will lead to strong pressures to augment regulation and oversight of mortgage lenders. Although our members are the most closely regulated entities in the market, we will continue to support efforts at ensuring that the mortgage consumer is properly informed and adequately protected in this most important financial endeavor.

We ask, however, that the Board, and indeed, all regulators, remain conscious to the severe burdens being placed upon banking institutions as authorities pile on more legislative and regulatory provisions on an unrelenting basis. Policymakers must begin to closely focus on regulatory costs and benefits, and expand efforts to avoid excessive regulatory burden. We note that the past months have seen—

- the creation of a broad new segment of lending , "higher-priced mortgage loans," that will impose new indices, price measurements, and legal repercussions of banks of all sizes;
- new rules regarding contacts with real estate appraisal professionals, issued by differing regulatory entities and pursuant to varying articulations;
- new rules imposing prohibitions on certain mortgage servicing practices;
- novel standards regarding the advertisement of mortgage-related products;
- brand new rules applicable to early mortgage disclosures that affect ability to collect fees in all covered transactions (and which are being further amended through the current rulemaking);
- a complete overhaul of the good faith estimate disclosure requirements, both in form and substance;
- a complete overhaul of mortgage settlement forms, along with a new set of preparation instructions that will apply to all mortgages;
- new upfront disclosure items that include comparison charts and term-related written recitations to consumers;
- various novel fee tolerances that apply at differing levels depending upon the type of service involved;

[2] The Board is also soliciting comments on the timing of disclosures for Home Equity Lines of Credit. Since those comments are not related to closed-end credit plans, ABA will be surveying its members on those specific items and submitting separate comments, as needed.

- new rules applicable to affiliated business transactions that can result in criminal liabilities;
- new servicing-related disclosures that apply to all mortgage transactions;
- new indices for loan-price reporting purposes that will require brand new calculations to measure APRs on individual loans, and will more than double the frequency of adjustments in the reporting triggers.

This list excludes the abundant programmatic changes under various government products and guidelines. We note that none of these changes, if enacted alone, would be labeled as either minor or insignificant. They are, however, being simultaneously thrust upon the banking industry with differing effective dates, and with the requirement that they must all be active, and properly functioning in unison, by this year's end. Since all these changes are interrelated and affect regulations that are interwoven in their application, they will require extreme synchronization with regard to execution, training, and implementation.

We note that various members have advised, in confidence, that they are likely to cease mortgage lending operations in light of the collection of extreme burdens and confusing changes being imposed in the current regulatory climate. Many of these banks, being smaller and handling less loan volume, will wait and reassess, at some future point, whether they will return to mortgage lending activities. Many other banks have declared no such plans. In either case, the significant point is that communities across the United States will lose the most trusted partner that they can have in the most important transaction that families enter in their lifetimes. The community banks and depository institutions—entities that were not involved in the excesses of subprime and predatory lending—are going to be very negatively impacted in this rapid and intense push to regulatory reform.

We urge, therefore, that the Board accept our comments and requests in the spirit of our industry's earnest attempt to respond to the ongoing burdens brought on by this national crisis. For the reasons stated below, we generally support the adoption of this rule as proposed, and provide the Board with certain requests and small technical comments.

MDIA

ABA believes that, as published, the proposed changes to Regulation Z are very consistent with the statutory changes set forth by MDIA. In light of Congress' tightly demarcated statutory provisions, the Board's proposal must necessarily follow

a rigid implementation line. There are, however, certain technical points that the Board should address in order to clarify the application of the new rules.

- *Section 226.19(a)(3) -- Definition of Bona Fide*

MDIA permits a borrower to expedite consummation by modifying or waiving the timing requirements for the early disclosures. Such waiver may occur where "*the consumer determines* [emphasis added] that the extension of credit is needed to meet a bona fide personal financial emergency." *MDIA §2502(F).* The statute also provides that the term 'bona fide personal emergency' may be "further defined in regulations issued by the Board." *MDIA §2502(F)(i).*

In the proposed rule, the Board does not explicitly define the term 'bona fide personal emergency,' but rather, allows the term to be defined in accordance to the facts surrounding individual circumstance. Under proposed Official Staff Interpretation §226.19(a)(3)-1, the rule reads "Whether a bona fide personal financial emergency must be met before the end of the waiting period is determined by the facts surrounding the individual situations."

Our first comment refers to what appears to be an oversight in the articulation of this provision. If this language is to remain as proposed, the language quoted above should be amended to read that the determination of whether a personal financial emergency has been met must be determined by the facts of the situation. As currently drafted, the provision appears to allow the consumer to determine whether an emergency must be met at all. This is not consistent with the statute, as the Congress clearly requires that the consumer decide *whether* an emergency indeed exists, not whether it *must* exist. At minimum, the word "must" should be replaced by "has."

More importantly, however, ABA requests that the Board use the authority granted by the statute to expand on the provision above, and clarify that creditors are entitled to rely on a borrower's assertion of what constitutes a "bona fide personal emergency." In short, there should not be any second-guessing by a lender of whether a bona fide emergency exists once the consumer asserts it as so, and as a corollary, lenders should be afforded, at minimum, a presumption that this standard has been met if there is a good faith reliance on the borrower's declaration of a bona fide emergency.

Such a presumption, or safe harbor, is essential in protecting creditors against spurious legal challenges. If such a presumption is not introduced in regulation, creditors will be extremely hesitant to rely on this exemption, as challenges could very likely arise regarding the existence of a bona fide emergency at points in the future if circumstances develop that would make such a determination advantageous

to the borrower. In the very example cited by the Board's proposal, at §226.19(a)(3)-2, the consumer appears to require that the closing occur on the fourth day following the delivery of initial disclosures, and is allowed to do so through a waiver. But this very instance could be challenged as not meeting the regulatory requirements because there does not appear to be a formal showing of an actual "emergency." That a consumer *wants* to close a loan by a particular day does not mean that she *must* close due to unexpected or serious circumstances. Without a presumption to protect the lender that relies on a consumer's assertion, the lender would be burdened with proving, beyond any doubt, that an emergency actually existed at the time of the waiver. A consumer would be forced to provide actual, and probably written and verifiable proof, of an emergency. Such evidentiary onus would destroy the flexibility that Congress meant to inject with this provision, and would certainly destroy the "personal" nature of the consumer's determination of whether an emergency actually exists.

Since the statute provides that the determination of "bona fide personal financial emergency" is to be left to the consumer, and is not to be left to the discretion of, nor policed by, the creditor, ABA requests that the Board introduce a presumption that protects a creditor that relies, in good faith, on a declaration via dated written statement as set forth under § 226.19(a)(3).

- *Section 226.19(a)(1)(i) and (a)(2) – Timing of Disclosures*

Under the proposed rule, a loan cannot be consummated until 7 business days following the delivery or mailing of the early disclosures. Nor can there be any fees paid until the consumer receives such disclosures (other than fees for obtaining a credit report). Finally, any corrected disclosures must be received by the consumer at least three business days before consummation. In all instances, the Board clarifies that disclosures are deemed to be received by the consumer three days after mailing. *See* 73 FR 74991. Such comments are consistent with MDIA and follow the provisions set forth by the Board in its July 2008 Final Rule.

ABA commends the Board for the clarity on this important item. We note, however, that more clarification is required. As written, the proposed rule does not account for situations other than direct mailings to consumers, or direct face-to-face delivery of the disclosures. The clearest omission is an electronic delivery of the required forms. In instances entailing either e-mails or facsimiles, where communication is virtually instantaneous, it would not make any sense to presume a 3-day delay between the sending of the disclosure and its receipt by the consumer.

ABA would ask that the Board consider a specific presumption rule applicable to electronic disclosures, where the consumer will be deemed to receive the disclosure one day after the actual sending of the electronic communication. ABA believes this

special rule makes sense in the context of modern e-mail systems and facsimiles, and is entirely consistent with the language of MDIA. Enacting such a narrowly tailored presumption would also add great flexibility in all transaction settings, allowing creditors to hasten the process, where needed, without the need to rely on the onerous "waiver" provisions.

- *Section 226.19(a)(2)—Redisclosure Requirements*

Under the proposed rule, if the APR at consummation varies beyond allowable tolerances—either ⅛ or ¼ of one percent—then the creditor must make corrected disclosures, and such corrections must be received by the consumers at least 3 business days before closing. *See* 73 FR 74991.

ABA believes that this redisclosure requirement should be subject to an exemption establishing that no additional waiting period is required in instances where the initial disclosure overstates the APR. Such an exemption would be consistent with existing rules under TILA §§ 226.22 and 226.18, where a disclosure above the tolerance is treated as accurate where an APR results from a "finance charge" that is greater than the amount required to be disclosed.

ABA believes that in such instances of over-disclosure, the lender should be required to accurately reflect the final APR on the closing documents, but the additional three-day waiting period should be waived. The objectives of MDIA—properly informing consumers and ensuring that they are able to shop for the best loan possible—are fully met, as the imprecision of the initial disclosure does not result in harm, but actually results in a better deal than that reflected on the early documents.

Coordination With HUD

As a final comment, we would like to emphasize that the Board and the Department of Housing and Urban Development must increase efforts to coordinate their regulatory actions as they pertain to mortgage-related transactions. The existing federal disclosure structure applicable to mortgages is one that relies on both TILA and the Real Estate Settlement Procedures Act (RESPA) to provide borrowers with the full set of information that they need to properly shop for a mortgage loan. These two laws overlap heavily, and each time one regulation is amended, the other is always affected.

We urge that the Board be ever mindful of this fact. True consumer understanding of the costs associated with the mortgage transaction is heavily dependent on their ability to grasp and process the figures contained in the disclosure forms mandated by these laws. The chain of events leading to the current rulemaking provides a singular example of the interrelatedness of these two laws. The concept of

restricting the payment of any fees (other than credit report) until accurate disclosures are provided to consumers was first formally announced by HUD, as a legislative proposal, in a report issued jointly by the Board and HUD in 1998. *See* "Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act" (1998). The Board, at that time, refrained from endorsing this concept, for various reasons. This notion of limiting fees did survive, however, and was formally adopted by the Board in the context of protections against "unfair and deceptive" actions through the Regulation Z proposed rules issued in January 2008, and then finalized on July 14, 2008. After the Board issued its proposal, HUD in turn adopted the same concept in March 2008, as a regulatory provision, in its own attempts to reform their Regulation X. This concept was then codified by the MDIA in October 2008, which now leads the Board to issue the current regulations, addressing certain additional details dealing with the same concept.

We note that this long process could have engaged officials from each agency throughout the decision-making process, as the consumer protection concept in question affects the same type of transaction, and involves interrelated forms and timing requirements that are, in large measure, meant to be synchronized. Yet, each step of the process was undertaken in piecemeal fashion, and in a manner that may still result in conflicts once all the different regulatory pieces are actually implemented by our members in the latter part of this year.

ABA stresses that federal authorities must focus on achieving the goals of simplicity and effectiveness in order to better inform and better protect consumers. These goals can only be achieved by recognizing the interdependence of the parts, and improving the upfront disclosures under <u>both</u> TILA and RESPA. Meaningful improvement will require that the agencies combine their efforts in a way that truly harmonizes all mortgage-related forms.

Conclusion

ABA thanks the Board for the timely and orderly implementation of rules pertaining to mortgage disclosures and we appreciate the opportunity to comment on these important changes to Regulation Z. We believe that the recommendations set forth above—a presumption that protects creditors that rely on a declaration of good faith personal financial emergency, a clarification that consumers are deemed to receive electronic disclosures one day after sending electronic communications, and a waiver of waiting periods in instances of over-disclosures of the APR—would make the application of these rules more cost-effective and more responsive to consumer needs.

ABA also urges the Board to strive towards achieving real efficiencies and improvements to the federal consumer disclosure laws through a holistic approach that recognizes the interdependence of TILA and other consumer protection laws, particularly RESPA. The current assortment of mortgage disclosures required by different federal laws is disparate, uncoordinated, and frighteningly voluminous. True improvements can only come through coordinated efforts by both HUD and the Board, working together to make mortgage-related disclosures as harmonious and effective as possible.

If you have any questions, please contact Rod J. Alba, at ralba@aba.com.

Sincerely,

Robert R. Davis