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MEMORANDUM

TO: Clients and Friends of the Firm

FROM: Al Alsup

DATE: November 5, 2008

RE: The Federal Reserve Board Adopts Comprehensive New Truth in Lending Act Regulations Targeting Abusive Lending Practices in Underwriting, Closing and Servicing of Subprime and Other Home Mortgage Loans (the "FRB Final Rule")

General Applicability and Effective date of the new FRB Final Rule

Comprehensive new Truth in Lending Act regulations recently adopted by the Board of Governors of the Federal Reserve System ("FRB") targeting abusive home mortgage lending practices will go into general effect in about one year on October 1, 2009 (the "FRB Final Rule").

Because these broad regulations may require large numbers of institutions to make major adjustments in their policies and practices, the deferred effective date is intended to provide these institutions a reasonable time to make the changes in their operations and systems needed to comply with the new rules without incurring excessively large expenses that ultimately would be passed on to the consumer. Compliance with the rules is not required before the effective dates, and acts or practices by institutions that would be restricted or prohibited under the rules when effective are not to be construed as unfair or deceptive practices in the meanwhile solely for that reason. Instead, the permissibility of practices of covered institutions before the effective date of the FRB Final Rule will be judged based on the totality of the circumstances under other applicable laws or regulations.

The FRB Final Rule imposes numerous new restrictions on, or requirements for, the mortgage lending and servicing process that are intended to protect consumers from unfair, deceptive, and abusive practices by loan originators and service providers. Not all of the new regulations apply to all home mortgage loans. Generally, the new regulations may be best examined under three broad categories of home mortgage loans to which they apply:

- *Deceptive Advertising Rules*. Regulations prohibiting deceptive or misleading advertising of credit availability apply to the broadest category of all home mortgage loans subject to TILA, including both open-end and closed-end credits that are secured by a dwelling, including both principal and second-home dwellings.

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- *Underwriting, Prepayment Penalty and Mandatory Escrow Rules.* Prohibitions against certain abusive underwriting practices, restrictions on prepayment penalties, and mandatory escrow account requirements apply only to certain higher priced home mortgage loans secured by a dwelling, including both principal and second home dwellings, which comprise both so-called "high-rate, high fee" loans regulated under the Home Ownership and Equity Protection Act of 1994 (HOEPA) (sometimes called "HOEPA" loans or "Section 32" loans) and a new category of "higher priced mortgage loans" (HPMLs) created under the new regulations. HPMLs are intended to encompass all so-called "subprime" loans and, because of the manner in which HPMLs are defined, will include at least some "Alt. A" home loans as well.

- *Appraiser Coercion, Abusive Servicing Practices, and Early Consumer Disclosure Rules*. Prohibitions against (i) coercing or improper influencing property appraisers, (ii) certain abusive loan servicing practices and (iii) imposition of an early TILA consumer disclosure timing rule apply only to the consumer-purpose, closed-end home mortgage loans secured by a consumer's principal dwelling.

These new regulations will apply to covered loans for which a creditor receives an application on or after October 1, 2009. However, new regulations requiring property tax and insurance escrows for certain "higher priced mortgage loans" apply to covered loans for which applications are received on or after April 1, 2010, or, if such loans are secured by manufactured housing, October 1, 2010. Regulations applicable to loan servicers apply to covered loans that are serviced on or after October 1, 2009, and new advertising regulations apply to advertisements that occur on or after October 1, 2009. This memorandum is intended to provide our clients a general overview of the key provisions of the FRB Final Rule, but the text of the rule itself should be referred to for a more detailed account and understanding. The new regulations, consisting of a Final Rule amending Regulation Z and the Official Staff Commentary to Regulation Z (12 CFR Part 226), which interprets and implements the federal Truth in Lending Act, were published in the Federal Register on July 30, 2008 (73 F.R. 44522 – 44614).

New Advertising Rules Applicable to All Home Mortgage Loans Secured by a Dwelling

Under the FRB Final Rule, all mortgage loans (i.e., not just HOEPA and HPML loans) subject to TILA and secured by a dwelling (i.e., not just a principal dwelling), both open-end and closed-end credits, are subject to new advertising regulations intended to assure that advertisements for credit provide accurate and balanced information about rates, monthly payments, and other loan features in a clear and conspicuous manner and that several deceptive and misleading advertising practices are ceased, including, for example, describing a loan as a "fixed rate" mortgage when in fact the rate can increase after closing.

These new advertising regulations are set out in amendments to Reg. Z, §226.16 (open-end credits) and §226.24 (closed-end credits) and apply to any advertisement (including promotional materials accompanying applications) in any medium promoting a credit transaction secured by a dwelling (except radio and television advertisements to which alternative regulations apply):

1. *Disclosures of Rates and Payments in Print Advertisements [Reg. Z, §226.24(f)(2)and (3)]*. If an advertisement for credit secured by a dwelling (other than television or radio advertisements) states a simple rate of interest when more than one simple annual rate of interest will apply over the term of the advertised loan, the advertisement must disclose in a clear and conspicuous manner each simple interest rate that will apply (based on a

reasonably current index plus margin if a variable rate transaction), the period of time during which each such rate will apply, and the annual percentage rate (APR) for the loan. If the advertisement states the amount of any payment, it must disclose the amount of each payment that will apply over the term of the loan, including any balloon payment, the period of time during which each such payment will apply, and the fact that the payments do not include escrow amounts for property taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater. These additional "trigger" disclosures must be *clear and conspicuous,* which for this purpose means that the required information must be disclosed with equal prominence and in close proximity to any such advertised rate or payment that triggered the required disclosures. However, these disclosure requirements would not apply to the envelope in which an application or solicitation is mailed or to a banner or pop-up advertisement linked to an application or solicitation provided electronically.

2. *Additional Rules Applicable to Open-End Home Equity Plans [Reg.Z, §226.16(d)].*

- *Discounted and Premium Rates.* If an advertisement states an initial annual percentage rate that is not based on the index and margin used to make later adjustments in a variable-rate plan, the advertisement must also state with equal prominence and in close proximity[1] to the initial rate (i) the period of time such initial rate will be in effect; and (ii) a reasonably current annual percentage rate that would have been in effect using the index and margin.

- *Balloon Payments.* If an advertisement contains a statement of any minimum periodic payments that will not fully amortize the outstanding loan balance by a specified date if only the minimum periodic payments are made, and result in a balloon payment that the consumer must repay, even if such a payment is uncertain or unlikely, the advertisement must also state with equal prominence and in close proximity to the minimum periodic payment statement that (i) a balloon payment will result, and (ii) the amount and timing of the balloon payment that will result.

- *Promotional Rates and Payments.* If an advertisement contains an annual percentage rate that is a "promotional rate" (i.e., a rate not based on the index and margin that will be used to make rate adjustments under the plan and is less than a reasonably current annual percentage rate that would be in effect using such index and margin) or a "promotional payment" (i.e., a minimum payment applicable for a promotional period that is not derived by applying such index and margin to the outstanding balance and is less than other minimum payments under the plan derived by applying such index and margin) the following must be disclosed in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional rate or payment: (i) the period of time during which the promotional rate or payment will apply; (ii) in the case of a promotional rate, the APR that will apply under the plan; and, in the case of a promotional payment, the amounts and time periods of any payments that will apply under the plan.

[1] A *clear and conspicuous* disclosure means that the required information is disclosed with *equal prominence* and in *close proximity* to the promotional rate or payment to which it applies. If the information is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures are deemed to be equally prominent and in close proximity.

3. *Alternative Disclosures for Television or Radio Advertisements [Reg.Z, §226.24(g]*. An advertisement made through television or radio stating orally any of the triggering terms requiring additional disclosures may comply with those requirements by either (i) stating clearly and conspicuously each of the required additional disclosures; or (ii) stating clearly and conspicuously the annual percentage rate (APR) and, if applicable, that the rate may increase after loan consummation, and listing a toll-free telephone number (or any telephone that allows a consumer to reverse the phone charges) along with a reference that such number may be used by consumers to obtain additional cost information.

4. *Disclosure Regarding Tax Implications [Reg. Z, §226.24(h]*. If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a loan secured by the consumer's *principal* dwelling and the advertisement states that advertised loan may exceed the fair market value of the dwelling, the advertisement must clearly and conspicuously state that (i) interest on any portion of the loan that exceeds the fair market value of the dwelling is not tax deductible for federal income tax purposes; and (ii) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

5. *Prohibited Acts or Practices in Advertisements [Reg. Z, §226.24(i)]*. The following acts or practices are expressly prohibited in advertisements for credit secured by a dwelling:

    - *Misleading advertising of "fixed" rates and payments.* Using the word "fixed" to refer to rates, payments, or a credit transaction in an advertisement for a variable rate transaction where the advertised rate or payment may increase (or other transaction in which the payment will increase, such as a stepped-rate mortgage) unless certain required qualifying statements are used, including, in a variable rate transaction, (i) using the phrase "adjustable rate mortgage," "variable rate mortgage," or "ARM" in the advertisement before the first use of the word "fixed" (or "fixed-rate mortgage" or similar term) that is at least as conspicuous as any use of the word "fixed" in the advertisement, and (ii) accompanying each use of the word "fixed" with an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed and the fact that the rate may vary or the payment may increase after that period. In an advertisement for a non-variable rate transaction where the payment may increase (e.g., a stepped-rate transaction with an initial lower payment) (i) each use of the word "fixed" to refer to the payment must be accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed and the fact that the payment will increase after that period.

    - *Misleading Comparisons in Advertisements.* Making any comparison in an advertisement between actual or hypothetical credit payments or rates and any payment or simple annual rate that will be available under the advertised loan program for a period less than the full term of the loan, unless the advertisement includes a clear and conspicuous comparison to the information required under the new "triggering" provisions of §226.24(f)(2) and (3) regarding enhanced disclosures of rates and payments (as summarized in 1. of this section above.) If such an advertisement is for a variable rate loan transaction and the advertised payment or simple annual rate of interest is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the loan, the advertisement must include (i) an equally prominent statement in close proximity to the advertised payment or rate to the effect that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

- *Misrepresentations about Government Endorsement.* Making any statement in an advertisement that the loan product offered is a "government loan program," "government-supported loan," or is otherwise endorsed or sponsored by any federal, state, or other government entity, unless the advertisement is for an FHA loan, VA loan, or similar loan program that is, in fact, endorsed or sponsored by a federal, state or local government entity.

- *Misleading Use of Current Lender's Name.* Using the name of the consumer's current lender in an advertisement that is not sent by or on behalf of the consumer's current lender, unless the advertisement (i) discloses with equal prominence the name of the person or creditor making the advertisement, and (ii) includes a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current lender.

- *Misleading Claims of Debt Elimination.* Making any misleading claim in an advertisement that the mortgage loan product offered will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor.

- *Misleading Use of the Term "Counselor."*. Using the term "counselor" in an advertisement to refer to a for-profit mortgage broker or mortgage creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating, or selling mortgages.

- *Misleading Foreign-Language Advertisements.* Providing information about some "trigger terms" or required disclosures, such as an initial rate or payment, only in a foreign language in an advertisement, but providing information about other trigger terms or required disclosures, such as information about the fully indexed rate or fully amortizing payment, only in English in the same advertisement.

New Rules Applicable to Closed End HOEPA and 'Higher Priced Mortgage Loans' Secured by the Consumer's Principal Dwelling

In addition to the foregoing new regulations, certain high-rate, high-cost loans described in Reg. Z, §226.32, and generally referred to as "Section 32 loans" or "HOEPA loans" and a new category of so-called "higher priced mortgage loans" ("HPMLs") are subject to four additional new consumer protections outlined in this section. "Higher-priced mortgage loans" are defined in new Reg. Z, §226.35 to mean consumer credit transactions secured by the consumer's principal dwelling having an annual percentage rate that exceeds the "average prime offer rate" for a comparable transaction as of the date the interest rate is set by 1.5, or more, percentage points for loans secured by a first lien on a principal dwelling or by 3.5, or more, percentage points for loans secured by a subordinate lien on a principal dwelling.[2] The average prime offer rate for this purpose means an annual percentage rate that is derived

[2] The FRB Final Rule substituted this definition of "higher-priced mortgage loans" for an earlier proposed definition of the term to mean closed-end mortgage loans secured by a consumer's principal dwelling having an annual percentage rate (APR) that exceeds

from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The source for determining the average prime offer rate will be a table compiled and published by the FRB at least weekly based on a broad range of types of current transactions from the Primary Mortgage Market Survey currently published by Freddie Mac.[3] The defined term "higher priced mortgage loans" expressly *excludes* new home construction loans, "bridge" loans with a term of 12 months or less, reverse mortgage loans, and home equity line of credit loans (HELOCs). However, creditors are expressly prohibited from attempting to structure a closed-end home mortgage credit as an open-end credit, as that term is defined in Reg. Z, §226.2(a)(20), for the purpose of evading these new requirements of the FRB Final Rule applicable to HOEPA and HPML loans.

The additional prohibitions or requirements imposed upon creditors in connection with HPMLs are summarized as follows:

- *Prohibited Lending without Regard to Repayment Ability [Reg. Z §§226.34(a)(4)and 226.35(b)(1)]*. Creditors are prohibited from extending credit for HOEPA loans or HPML loans to consumers based on the value of the consumer's collateral without regard to the consumers' ability as of the date of consummation to repay the loan from sources other than the collateral itself. To determine repayment ability, creditors must consider the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations such as expected property taxes, required property insurance, and similar expenses. Creditors are required to verify borrowers' income and assets relied upon in underwriting the loan, thereby prohibiting so-called "stated income" and "no docs" loans. Specifically, a creditor, when approving an extension of credit, is prohibited from relying on stated amounts of income, including expected income, or assets unless the creditor verifies such amounts by inspection of the consumer's Internal Revenue Service federal tax returns and Form W-2, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income and assets. However, even if failing to fully comply with these verification requirements, a creditor will not be deemed to violate the prohibition against lending without regard to repayment ability if the amounts of income and assets that the creditor relied upon in determining repayment ability are not materially greater than the amounts of the consumer's income or assets that the creditor could have verified in this manner at the time the loan was consummated — a sort of "no harm-no foul" rule.

  Moreover, a presumption of compliance[4] protects creditors who verify a consumer's repayment ability by inspecting such third-party documents if the creditor additionally:

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the rate of comparable Treasury Securities by three or more percentage points for first-lien transactions or five or more percentage points for subordinate lien transactions. The meaning of "Comparable Treasury Securities" and the manner of determining their yield for this purpose were also set out in the FRB's earlier proposal.

[3] The FRB also adopted a final rule (73 F.R. 63329 October 24, 2008) amending Regulation C to the federal Home Mortgage Disclosure Act (HMDA) that will require lenders to collect and report the rate spread between a loan's APR and the "average prime offer rate" if the spread meets or exceeds 1.5 percentage points for a first-lien loan or 3.5 percentage points for a subordinate-lien loan. The new reporting requirements are mandatory for loan applications taken on or after October 1, 2009 and for loans closed on or after January 1, 2010, regardless of when loan application is taken.

[4] The FRB Final Rule substituted this presumption of compliance rule for its earlier proposed presumption of a violation if the creditor engaged in a "pattern and practice" of failing to verify and document consumers' repayment ability under extensive proposed regulations for verification of income and assets and underwriting repayment ability. The FRB Final Rule also deleted the proposed "pattern and practice" language that to constitute a violation would have required proof that the creditor engaged in a "pattern or practice" of extending credit without regard to repayment ability. Under the FRB Final Rule, a single such instance by a creditor of extending credit without regard to repayment ability constitutes a violation.

(i) determines the consumer's repayment ability based on the largest payment of principal and interest scheduled in the first seven (7) years of the loan term and takes into account in that determination the consumer's current obligations and mortgage-related obligations; and

(ii) assesses the consumer's repayment ability taking into account at least one of the following: the consumer's debt-to-income ratio or the net income the consumer will have available after paying debt obligations.

But no such presumption of compliance is available to creditors for any loan transaction for which (i) the regularly scheduled periodic payments for the first seven (7) years would cause the principal balance to increase (i.e., loans with a negative amortization feature); or, (ii) the term of the loan is less than seven (7) years and the regularly scheduled periodic payments when aggregated do not fully amortize the outstanding principal balance of the loan (i.e., loans with a balloon payment feature).

- *Restrictions on Prepayment Penalties [Reg. Z, §§226.32(d)(6) and 226226.35(b)(2)]*. Creditors extending HPML loans would be permitted to charge a prepayment penalty only under similar conditions applicable to HOEPA loans as set out in §226.32(d), as amended by the FRB Final Rule. Under the FRB Final Rule, HOEPA and HPML loans may provide for a prepayment penalty if (i) the penalty is otherwise permitted by state or other applicable law; (ii) the source of prepayment funds is not a refinancing by the same creditor, or its affiliate; (iii) the prepayment penalty will not apply after the two-year period[5] following loan consummation; and (iv) the amount of the periodic payment of principal or interest, or both, does not change during the four-year period following loan consummation. HOEPA loans have one additional condition not applicable to HPMLs, viz: the consumers's total monthly debt payments (including amounts owed under the mortgage loan) may not exceed 50% of the consumers' gross monthly income as of the date of loan consummation, as verified under the new procedures requiring review of federal tax returns, Form W-2s, payroll receipts, bank records, or other third-party documents that provide reasonably reliable evidence of the borrower's income.

- *Mandatory Escrow Accounts [Reg. Z, §226.35(b)(3)]*. Under the FRB Final Rule, creditors, before loan consummation of a *first-lien HPML loan*, must establish and maintain an *escrow account* (the term having the same meaning as defined in Reg. X, §3500.17(b)) to collect reserves for the payment of property taxes and premiums for mortgage-related insurance required by the creditor, such as insurance against loss of, or damage to, property, insurance against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss. However, HPML loans secured by shares in a cooperative are exempt from this mandatory escrow account requirement and property insurance reserves are not required to be included in escrow accounts established for HPML loans secured by condominium units in which the condominium association is obligated to maintain a master policy insuring condominium units on behalf of unit owners.

[5] The FRB revised its earlier proposed rule that would have permitted a prepayment penalty within 5 years after consummation but ending at least 60 days prior to the first date, if any, that the monthly payment of principal and interest could increase under terms of the loan.

After the first loan year, however, the creditor or loan servicer may permit a consumer to cancel the mandatory escrow account if the consumer requests cancellation in a dated written request to cancel the escrow account received by the creditor no earlier than 365 days after loan consummation.

New Rules Applicable to All Consumer-Purpose, Closed-End Loans Secured by the Consumer's Principal Dwelling

Under the FRB Final Rule, all consumer-purpose, closed-end loans secured by a consumer's principal dwelling are subject to three new consumer protections:

- *Prohibited Coercion of Appraiser.[Reg. Z, §226.36(b)]* Creditors and mortgage brokers, and their affiliates, are prohibited from directly, or indirectly, coercing, influencing, or otherwise encouraging an appraiser to misstate or misrepresent the value of a consumer's principal dwelling securing a covered loan. A "mortgage broker" for purposes of this anti-coercion prohibition means a person, other than an employee of a creditor, who, for or in expectation of compensation or monetary gain, arranges, negotiates, or obtains an extension of consumer credit for another person (even when the mortgage broker is the named payee of the credit obligation under a table funding arrangement).

  Prohibited actions include (i) implying to an appraiser that current or future engagements of the appraiser depend upon the amount at which the appraiser values the property, (ii) excluding an appraiser from consideration for future engagements because the appraiser reports a value of a property that does not meet or exceed a minimum threshold value, (iii) telling an appraiser a minimum reported value of a property that is needed to approve the loan, (iv) failing to compensate the appraiser unless the appraised value of the property reported is at or above a particular amount, or (iv) conditioning compensation to the appraiser on actual loan consummation.

  However, creditors and mortgage brokers are not prohibited under the rule from such actions as (i) asking an appraiser to consider comparable properties or to consider additional information about the appraised property; (ii) requesting the appraiser to provide additional information about the basis of the valuation; (iii) requesting that the appraiser correct factual errors in the appraisal report; (iv) obtaining multiple appraisals of a property (so long as the creditor or mortgage broker adhere to a policy of selecting the most reliable appraisal, rather than just the appraisal that states the highest value); or (v) withholding compensation from the appraiser for breach of contract or substandard performance, or taking other action affecting the appraiser that is permitted or required by applicable state or federal law or regulations.

  Any creditor who knows[6] at or before a loan closing of a violation of these anti-coercion regulations is prohibited from extending credit based upon such an appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the appraised property. A misstatement or misrepresentation of value would not be regarded as "material" for this purpose if it does not affect the credit decision or the terms upon which credit is extended. An "appraiser" for purposes of this section means a person who engages in the business of providing assessments

[6] Presumably, prior actual knowledge of a violation of these anti-coercion regulations is required to constitute a violation by a creditor extending credit secured on a principal dwelling since the earlier proposed wording "knows or has reason to know" was not adopted in the FRB Final Rule.

of the value of dwellings and includes persons (both natural persons and business entities) that employ, refer, or manage appraisers and affiliates of such persons.

- *Prohibited Servicing Practices.[Reg. Z, §226.36(c)]* Mortgage *servicers* are prohibited from engaging in certain servicing practices[7] in connection with a consumer credit transaction secured by a consumer's principal dwelling, including:

  (a) *Failing to Timely Credit Payments.* Servicers must credit a payment to the consumer's loan account as of the date of receipt (except when (i) a delay in crediting the payment does not result in any charge to the consumer or in the reporting of negative information to a consumer credit reporting agency, or when (ii) payments are accepted that do not conform to a creditor's written requirements that a consumer must follow in making payments, in which case the payment must be credited as of five days after receipt);

  (b) *Pyramiding Late Fees.* Servicers must not impose a late charge on a consumer in connection with the receipt of a payment when the only delinquency is attributable to a late fee or delinquency charge assessed on an earlier payment, and the current payment is otherwise a full payment made on or before its due date or within an applicable grace period; and

  (c) *Failing to Timely Provide Payoff Statements*. Servicers must provide an accurate payoff statement within a reasonable time after receiving a request for it by a consumer (or a person acting on behalf of a consumer, such as an attorney or consumer counseling representative), setting out the total outstanding balance of the consumer's loan obligation that is required to satisfy the obligation in full as of a specified date. Generally, a servicer would be regarded as acting within a "reasonable time" if it provides an accurate payoff statement within five (5) business days after receiving the consumer's request.

  Mortgage "servicer" and "servicing" for this purpose have the same meanings as the definitions ascribed to those terms in RESPA regulations (Reg. X, §3500.2).

- *Required Early TILA Consumer Disclosure [Reg. Z, §226.19(a)(1)(i)]*. To assure that transaction-specific disclosures are provided to consumers early enough to use while shopping for a mortgage loan, an early TILA consumer disclosure, which formerly was required only for residential mortgage transactions to finance the purchase or initial construction of a principal residence, must now be made by a creditor in connection with all closed-end loans secured by the consumer's principal dwelling, including home loan refinancings. The specific early consumer disclosure required by the new rule is referred to in the rule as a "good faith estimate" of the disclosures required by Reg. Z, §226.18, including the APR, Finance Charge, and other material disclosures, and is commonly referred to in the industry as the "initial TIL." This new rule merely conforms Reg. Z regulations to the actual industry custom and practice of lenders' providing early TILA disclosures for all covered loans.

[7] The FRB withdrew its earlier proposal to require servicers to deliver to consumers upon request an itemized schedule of fees and charges (including third-party fees) that may be imposed after loan closing in connection with the servicing of the loan account. The proposed rule requiring such a schedule was opposed by most commenting because the cost and administrative burden of producing and maintaining the schedule outweighed any practical benefit to consumers.

The early TILA consumer disclosure must be delivered to the consumer at the time of loan application or placed in the mail within three business days after application. Consistent with the current rule, no creditor or other person may impose a fee (other than a bona fide and reasonable fee to cover the cost of a credit report) on the consumer in connection with the consumer's mortgage loan application before the consumer's receipt of the early TILA consumer disclosure (although, if mailed, the consumer is presumed to have received the disclosure three business days after it is mailed). For purposes of this rule, "business day" means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a) (including currently New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day).

Mortgage Disclosure Improvement Act of 2008
Also Amends the Timing and Disclosure Rules, Effective July, 2009

Congress enacted the Mortgage Disclosure Improvement Act of 2008 on July 28, 2008, (Title V, §§2501 –2503 of the Housing & Economic Recovery Act of 2008, Public Law No. 110289, 122 Stat. 2654) that further regulates the form and timing requirements of consumer disclosures required under Reg. Z, §226.19(a) and (b).These new disclosure requirements apply to any extension of credit that is secured by the dwelling of a consumer and also subject to the Real Estate Settlement Procedures Act. Subject to further implementing rulemaking by the FRB, the new requirements will be effective 12 months after enactment, or July 28, 2009.

As amended, §226.19(a) will require that such early disclosures (referred to in that section as "good faith estimates of the disclosures required under [§226.18]"] comply with the following additional rules:

- *Timeliness of Disclosures*. Early disclosures must be delivered or placed in the mail not later than three business days after the creditor receives the consumer's written application, *which shall be at least 7 business days before consummation of the transaction*, and final disclosures must be provided at the time of consummation of the transaction. In any case in which the early disclosure statement contains an annual percentage rate of interest that is no longer accurate the creditor must furnish an additional, corrected statement to the borrower *not later than 3 business days before the date of consummation* of the transaction. No creditor or other person may impose a fee (other than a bona fide and reasonable fee to cover the cost of a credit report) on the consumer in connection with the consumer's mortgage loan application before the consumer's receipt of the early consumer disclosures (although, if mailed, the consumer is presumed to have received the disclosure statement three business days after it is mailed).

- *Waiver of Timeliness of Disclosures.* To expedite consummation of a transaction, if the consumer determines that the extension of credit is needed to meet a "bona fide personal financial emergency" (as that term may be defined by the FRB in implementing rulemaking), the consumer may waive or modify the timing requirements for disclosures if (i) the consumer provides the creditor a dated, written statement describing the emergency and specifically waiving or modifying those timing requirements, and (ii) the creditor provides to the consumer final disclosures required by §226.19(a) at or before the time of such waiver or modification.

- *Promulgated Notice*. Early disclosures, corrected disclosures, and final disclosures at consummation must state in conspicuous type size and format, the following:

"YOU ARE NOT REQUIRED TO COMPLETE THIS AGREEMENT MERELY BECAUSE YOU HAVE RECEIVED THESE DISCLOSURES OR SIGNED A LOAN APPLICATION.";

- *Variable Rate Disclosures*. Credit transactions in which the annual rate of interest is variable (or under which the regular payments may otherwise be variable) must additionally disclose the following:

  (i) The payment schedule must be labeled as follows: "Payment Schedule: Payments Will Vary Based on Interest Rate Changes."

  (ii) Examples of adjustments to the regular required payments based on the change in the interest rates specified by the credit contract must be stated in conspicuous type size and format. Among the required examples, an example must be included that reflects the maximum payment amount of the regular required payments based on the maximum interest rate allowed under the contract. (Prior to issuing rules implementing this rule, the FRB must conduct consumer testing to determine the appropriate format for providing the disclosures to consumers so that they can be easily understood, including the fact that the initial regular payments are for a specific time period that will end on a certain date, that payments will adjust afterwards potentially to a higher amount, and that there is no guarantee that the borrower will be able to refinance to a lower amount.)

Proposed Mortgage Broker Compensation Rule Withdrawn

The FRB Final Rule omitted its controversial proposed rule that would have prohibited mortgage creditors from making any payment to a mortgage broker unless the mortgage broker had first entered into a written agreement with the consumer (before the consumer had paid any fee or submitted a written loan application to the mortgage broker) that stipulated a maximum total compensation the mortgage broker would be entitled to receive for its services and contained certain required disclosures to inform consumers of the potential conflict of interest mortgage brokers may have when setting interest rates from which yield spread premiums are derived. The proposal was intended to limit the potential for unfairness, deception, and abuse in creditors' compensation of mortgage brokers by payment of yield spread premiums while preserving the ability of consumers to finance their mortgage broker fee obligations by paying a premium interest rate. The FRB withdrew the proposed broker compensation rule based on its analysis of comments opposing the rule and consumer testing it conducted independently that raised concerns that the proposed written broker agreement and consumer disclosures would confuse consumers and undermine their understanding of the relationship between interest rates and mortgage broker compensation. The proposed mortgage broker compensation rule and other provisions of the FRB proposed rule are summarized in our Client Memorandum of May 23, 2008 posted under the Legal Articles tab of our Website at www.LoanLawyers.com.