COMMENTS
to the
Federal Reserve Board

12 CFR Part 226
[Regulation Z; Docket No. R-1378]
Truth in Lending – Interim Rule
Requiring Notice to Consumers by Owners of Mortgage Loans

by the National Consumer Law Center
on behalf of its low-income clients
and for the
Consumer Federation of America
National Association of Consumer Advocates
January 19, 2010

The **National Consumer Law Center**[1] ("NCLC") submits the following comments on behalf of its low income clients, as well as the **Consumer Federation of American** and the **National Association of Consumer Advocates**[2] ("NACA"), to the Federal Reserve Board.

We appreciate this opportunity to comment on the Board's Interim Rule. We generally approve of the Board's Interim Rule implementing the provisions of Section 404(a) of the Helping Families Save Their Home Act. The Board's interpretations of the statute's requirements are – for the most part – clear, logical, and an appropriate extension of Congressional intent. While we have a number of specific recommendations for improvements of the Board's Interim Rule, we also hope to encourage the Board to provide essential clarification of the *other* mortgage transfer disclosures amended by Congress when it passed the Helping Families Their Homes Act in May, 2009.

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[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending*, (6th ed. 2007), *Cost of Credit: Regulation, Preemption, and Industry Abuses* (4th ed. 2009), and *Foreclosures* (2nd ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to address predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments were written by NCLC attorneys Margot Saunders and Diane E. Thompson.

[2] The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

I. The Board should provide guidance on the obligations imposed in Section 1641(f)(2).

Section 1641(f)(2) has long required servicers to answer homeowners' questions as to who owns the note:

> Upon written request of the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

Despite the clear, mandatory language, this provision has never worked. Servicers have routinely flouted the law with impunity.[3] Senator Boxer, the author of Section 404, noted the lack of meaningful penalties in introducing the legislation.[4]

Senator Boxer's amendment, adopted by Congress, sought to ensure that homeowners are apprised of the name, address and telephone number of the owner of their loan by making three separate changes in TILA:

1. New §1641(g) requiring ownership information upon transfer of the ownership of the note;
2. Explicitly creating a private right of action for violating §1641(g); and
3. Explicitly endorsing a private right of action for violating §1641(f)(2).

All three changes should be given meaning. The Board, in its interim rule, interprets the §1641(g) provisions. The Board should not neglect §1641(f)(2). Even with the new §1641(g) requirements, there will be many situations in which consumers will still need to use §1641(f)(2). The transfer may have occurred before the effective date of the new requirement in 2009, or the consumer may have misplaced or never received a transfer notice. Consumers in litigation may also need to use these provisions to confirm the chain of title or the current holder. The Board's rulemaking on §1641(g) should not be used to excuse servicers from prompt compliance with their existing requirements under §1641(f)(2).

While Congress did not change the substance of §1641(f)(2), the addition of a private right of action adds new importance for all parties in clear and consistent interpretation of §1641(f)(2). In order to give full effect to Congressional intent, the Board needs to resolve several issues under §1641(f)(2):

1) How long should a servicer have to respond to a request from the obligor under §1641(f)(2)? We suggest that servicers should be required to respond to a request

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[3] *See, e.g.,* Meyer v. Argent Mortgage Co. (*In re* Meyer), 379 B.R. 529 (Bankr. E.D. Pa. 2007) (discussing servicer's failure to respond to §1641(f)(2) letter and denying rescission since the rescission letter was not mailed to the holder before the expiration of the three-year limitations period, but only the servicer).

[4] Senator Boxer said: "[F]ederal law does require that the servicer tell the homeowner the identity of the person holding their mortgage. …While servicers are required to disclose this information, there are no penalties in the law for noncompliance and no remedies for a homeowner faced with a recalcitrant servicer." *See* 155 Cong. Rec. S5098-99 (daily ed. May 5, 2009).

from a homeowner for information about the owner of their loan within five business days of receiving the request.

2) What circumstances would justify the servicer's provision of the name of the master servicer rather than the owner of the loan? We suggest that servicers only be permitted to provide the name of the master servicer instead of the owner if the master servicer is the legal agent for the owner, such that service of legal process or a rescission notice on the master servicer will constitute service on the owner. Homeowners need to know who the owner is to serve a rescission notice or confirm the authority of the party initiating a foreclosure action or offering a loan modification.[5] Providing the name of the master servicer does not serve these purposes and interposes a delay, which may be fatal to a homeowner's rescission claim.

3) Who is liable for a violation of § 1641(f)(2)? We suggest that both servicers and their principals—the owners of the obligations—are liable. Although the language of 15 U.S.C. §1640 only explicitly imposes liability on creditors, Congress's addition of a reference to §1641(f) in 15 U.S.C. §1640 only has meaning if servicers are liable for violations of 15 U.S.C. §1641(f)(2), since 15 U.S.C. §1641(f) only applies to servicers.

The authority that the Board has to issue regulations interpreting §1641(g) also provides authority for the Board to provide guidance for §1641(f)(2). The Board should take this opportunity to clarify the issues on this important provision. Doing so does not impose an undue burden on servicers: servicers have long been required to provide this information; servicers will always have this information; and servicers may often be providing this information to borrowers under §1641(g) as agents of the owner. Providing additional guidance would reduce costs and facilitate compliance for all parties.

II. Comments on the Board's Interim Regulation

A. The Board Should Expand the Definition of Covered Persons

While the Board correctly recognizes in § 226.39(a)(1) that the reach of 1641(g) extends beyond the technical definition of "creditor" embodied in the Truth-in-Lending Act, the Board's restrictions on the reach of coverage contravene Congressional intent that all homeowners receive notice whenever the owner of their loan changes hands.

The Board correctly uses "covered person" rather than "creditor" to describe persons subject to the rule's requirements. While Congress used the word "creditor" to describe owners of the loans, its obvious intent was not to limit the new rule's application to the original lender on the mortgage loan. Indeed such a limitation would defeat the entire purpose of the rule and render the new provision meaningless.

The Board should go further in clarifying that covered persons are creditors for the purposes of application of the remedy provisions in 15 USC § 1640(a). Obviously if the obligations of

[5] Reports of homeowners sued multiple times on the same note by different entities are increasing.

the new §1641(g) apply to persons who are not technically creditors under TILA (generally limited to the originators of credit), then the penalties for not complying with those new obligations should apply to the same group of people: all owners of home secured mortgage debt. Such clarification by the Board would likely reduce litigation costs.

The Board's limitation of the term "covered persons" to owners who acquire more than one mortgage loan a year is, however, unwarranted. There is no reason that individual financers of home mortgages should not be required to provide this essential and simple notice to the homeowner. The notice takes virtually no time to draw up and mail; the information in the notice has to be known to both the original creditor and the new owner of the mortgage loan. The Board's supposition that the servicing of such a loan would necessarily transfer with the change in ownership is not necessarily correct in all instances. The exemption proposed in § 226.39(a)(1) for owners who transfer only one mortgage loan a year is neither necessary nor justified and risks denying homeowners crucial information.[6]

The Board's restriction of coverage to those who acquire legal title could be used to evade the rule. Of particular concern is the status of loans in the Mortgage Electronic Registration System (MERS).[7] MERS generally claims to hold title to the mortgage only (as a nominee) but not the note.[8] Therefore, transfers of the note's ownership within the MERS system should be subject to the rule. The Board should clarify that transfers between members in the MERS system are subject to the disclosure requirements, regardless of the precise language used by MERS or its members in transferring the note. In all cases, the Board should require that the homeowner be provided notice with the actual owner of the legal obligation, whether the note is transferred to MERS or transferred within the MERS system.

The Board adopts the existing exception in TILA for servicers who hold legal title to the obligation solely for "administrative convenience."[9] It is not clear what legal significance, outside of the assignee liability provisions of TILA, an assignment for "administrative convenience" has or how a party other than the servicer would confirm that such an assignment was for administrative convenience solely. A servicer would most likely take assignment for administrative convenience in order to prosecute a foreclosure in its own name rather than in the holder's name. But if the assignment is solely for administrative convenience this action would be more properly accomplished under most state laws through the use of a properly executed power of attorney. Condoning the use of transfers for administrative convenience muddies complicated issues of state law involving requirements for standing and real party in interest in foreclosure proceedings. Moreover, if the servicer has taken assignment for administrative convenience, a notice of rescission to the servicer should be effective as to the actual holder: if the servicer and owner are to benefit from the blurring of the lines, borrowers should also be entitled to the benefit of administrative convenience.

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[6] Foreclosure rescue scammers – and those who conspire with them – are examples of parties who might only acquire one mortgage a year.

[7] For information about MERS, *see* NCLC Foreclosures, § 4.3.4A.

[8] Mortgage Elec. Registration Sys., Inc. v. Estrella, 390 F.3d 522, 524-25 (7th Cir. 2004).

[9] 15 U.S.C. § 1641(f)(2).

We suggest that the Board clarify these issues. In cases of transfer for administrative convenience the Board should require a special notice. This notice would notify the homeowner that:

- A transfer to the servicer has occurred;
- The transfer is solely for administrative convenience;
- The owner remains unchanged (with the owner's identifying information provided again); and
- That by giving assignment for administrative convenience to the service, the owner is authorizing the servicer to accept on behalf of the owner service of all legal papers, including counterclaims in a foreclosure and rescission notices.

B. The Board's Definition of a Mortgage Loan Is Appropriate

The Board is correct to clarify that the statute applies to all consumer credit transactions secured by a principal dwelling of a consumer, including loans secured by manufactured homes[10] We also support the Commentary's clarification that both home equity lines of credit and closed-end mortgage loans are covered.[11]

C. Every Consumer Who Is Entitled to a Rescission Notice or Is Liable on the Note Should Receive Notice of Transfer of Ownership.

One of the primary benefits of the new statutory provisions is that consumers will be able to identify to whom to send a rescission notice. The Board should not undermine this benefit by permitting notice to only one consumer.

Every consumer who is liable for the mortgage or would be entitled to rescind should receive this notice—for the same reasons notice of rescission rights must be provided to multiple obligors and homeowners who are not obligated on the note. Notice to only one party is no guarantee that multiple obligors will receive it. For example, in a divorce or separation, a notice mailed to only one borrower might well not be passed on to the other borrower.

Sending two notices is not costly, simplifies compliance, and reduces the risk that an interested borrower will not receive the notice. There is no reason not to send the identical notice of the new owner's information to all consumers who might have a reasonable interest in the information. As a result, the disclosure should be provided to –

- all consumers obligated on the mortgage loan, and to the extent they are different,
- all consumers – whether or not obligated on the loan – who had a right to receive a rescission notice at the time the mortgage loan was originated.

[10] Reg. Z, § 226.39(a)(2).
[11] Official Staff Commentary, § 226.39(a)(2)-1.

D. The Board Should Expand the Required Disclosures to Include Critical Information and Additional Clarity.

In addition to the need to provide clear disclosures in the case of transfers for administrative convenience, discussed in II.A., *supra*, the Board must expand the content of the disclosures to ensure that borrowers are provided accurate and complete information and are not misled by the notices.

1. In Order to Provide Complete Information to Borrowers, the Board Should Require a Complete List of the Transfers of the Obligation in Each Notice.

The Board has carved out an exception from the strict requirements of the statute that notice of the transfer be sent upon every transfer. The Board proposes to allow an owner who maintains ownership for 30 days or less to omit the notice of the transfer. The rationale is that consumers would be confused upon receiving multiple disclosures of a change of ownership within a short period of time. The Board requires the disclosure to only be provided when the new owner maintains ownership for at least 30 days. The subsequent owner then sends the disclosure notice.

This exception is unobjectionable, so long as the subsequent owner is required to include in its disclosure information about the prior owner who did not provide the notice. In fact, the full chain of title should always be included in all disclosures provided under this subsection. Each transfer of ownership of the loan—from whom, to whom, and the date of transfer—should be included in every disclosure. In this way, if there is any question of ownership of the mortgage, previous owners will be listed so that these questions can be resolved. This will also facilitate borrowers' exercise of rescission rights

2. Owners Should Be Required to Provide More Information about Their Agents, Including Basic Information about RESPA Rights.

The Board requires that the notice sent to the borrower must disclose how to reach an agent or party having authority to act on behalf of the covered person.[12] The notice must identify a person (or persons) authorized to receive legal notices on behalf of the covered person and resolve issues concerning the consumer's payments on the loan.[13]

The Board permits a covered person to comply with this requirement by providing the phone number for the agent, if the consumer can use the phone number to obtain the agent's address.[14] Borrowers may mistakenly rely on telephone communication to attempt to resolve payment disputes or provide notice of rescission. Moreover, in this age of interminable telephone queues, sending a borrower to hold on a telephone line is hardly a service.

Listing agents for receipt of legal notice is helpful in carrying out at least one purpose of the Act, which is to provide the borrower with the identity of persons authorized to receive

[12] Reg. Z, § 226.39(d)(3).
[13] *Id.*
[14] *Id.*

notice of rescission. Without expansion, however, this notice may be less helpful, or even misleading, to borrowers attempting to resolve payment disputes. Under the Real Estate Settlement Procedures Act (RESPA),[15] a borrower's notice of a payment dispute must be in writing in order to trigger RESPA's protections. Servicers are allowed to provide a special address for payment disputes under RESPA and to ignore misaddressed notices from borrowers. In order to protect borrowers, the Board should require that an owner who designates an agent for the purposes of resolving payment disputes provide the correct address for qualified written requests under RESPA and notify the borrower, in the transfer of ownership notice, that only written requests to that address will trigger RESPA rights.

Particularly in the case of multiple agents, the Board should require specificity in the description of the agent's authority. When multiple agents are listed, the notice should describe how the authority for each agent differs, noting, for example, that only one agent is authorized to receive legal notice and another to resolve payment disputes. Even if only a single agent is listed, any limitations on the agent's authority (for example, the agent may be authorized to resolve payment disputes but not to receive service of process) should be made explicit.

5. The Board Should Require Notice as to Where the Security Interest Is Recorded, Not Where the Transfer of Ownership of the Debt Is Recorded.

The 2009 Act provides that the notice disclose "the location of the place where transfer of ownership of the debt is recorded."[16] Because the statute refers to ownership of the debt, the Board has construed the requirement as applying only if transfer of ownership of the debt has been recorded. This interpretation of the disclosure requirement will render it meaningless. Transfer of the debt obligation—the note—is not usually recorded. Transfer of the mortgage, by assignment, usually is. The Board should require disclosure of the location where the covered person's security interest in the property is located.

6. Notice Should be Provided Whenever the Note is Repurchased.

The Board proposes to exclude from notice of transfer of ownership repurchased notes so long as the liabilities are still carried on the books of the seller. Accounting rules may not have anything to do with legal liability for rescission or authority to conduct a foreclosure. Moreover, because of the stringent limitations on assignee liability, borrowers may most need to know the actual legal ownership when a note has been repurchased. The Board should require notice to borrowers when a note is repurchased, regardless of the accounting conventions observed.

[15] 12 U.S.C. § 2605(e).
[16] 15 U.S.C. § 1641(g)(1)(D).