

MEMORANDUM

To: Subscribers to the *Truth-in-Lending Manual*

From: A.S. Pratt & Sons

Subject: Highlights

Enclosed you will find your 2008 Update No. 1 to the *Truth-in-Lending Manual*. This update covers recent developments and court decisions, including the following:

Regulatory Update

- ***Electronic Disclosure — Regulations M and Z.*** In December 2007, the Federal Reserve Board adopted revisions to Regulations M and Z to withdraw portions of the interim final rules (compliance with which has remained optional since their adoption) for the electronic delivery of disclosures issued March 30, 2001, and to retain certain provisions of the interim rules that provided regulatory relief or guidance regarding electronic disclosures. See ¶¶ 2.08, 13.07 and numerous other portions of the text.
- ***Proposed Protections for Mortgage Loan Borrowers.*** In December 2007, in response to the subprime lending meltdown, the Federal Reserve Board proposed amending Regulation Z to “protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing practices.” The amendments would include seven new protections for home mortgage loan borrowers, four that would apply to higher-priced home mortgage loans and three that would apply to all home mortgage loans. The FRB also proposed amending Regulation Z to improve mortgage loan advertising and to require creditors to make transaction-specific mortgage loan disclosures, such as the APR and payment schedule, for all home-secured, closed-end loans no later than 3 days after application and before the consumer pays any fee except a reasonable fee for the originator’s review of the consumer’s credit history. See 73 Federal Register 1672 (Jan. 9, 2008). Comments are due by April 8, 2008. See ¶ 1.01.

For higher-priced mortgage loans — that is, consumer-purpose, closed-end loans secured by a consumer’s principal dwelling and having an annual percentage rate (APR) that exceeds the comparable Treasury security by three or more percentage points for first-lien loans, or five or more percentage points for subordinate-lien loans — the FRB proposed to:

- Prohibit creditors from engaging in a pattern or practice of extending credit without regard to borrowers’ ability to repay from sources other than the collateral itself.
- Require creditors to verify income and assets they rely upon in making loans.
- Prohibit prepayment penalties unless certain conditions are met.
- Require creditors to establish escrow accounts for taxes and insurance, but permit creditors to allow borrowers to opt out of escrows 12 months after loan consummation.

The FRB proposed three protections that would apply to all closed-end loans secured by a consumer’s principal dwelling, which would:

- Prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive.

- Prohibit any creditor or mortgage broker from coercing, influencing, or otherwise encouraging an appraiser to provide a misstated appraisal in connection with a mortgage loan.
- Prohibit mortgage servicers from “pyramiding” late fees, failing to credit payments as of the date of receipt, failing to provide loan payoff statements upon request within a reasonable time, or failing to deliver a fee schedule to a consumer upon request.

Regarding advertising, the FRB proposed to require that advertisements for both closed- and open-end mortgage loans provide accurate and balanced information, in a clear and conspicuous manner, about rates, monthly payments, and other loan features. The Board proposed to prohibit the following seven deceptive or misleading practices in advertisements for closed-end loans:

- Advertising “fixed” rates or payments for loans whose rates or payments can vary without adequately disclosing that the interest rate or payment amounts are “fixed” only for a limited period of time, rather than for the full term of the loan.
 - Comparing an actual or hypothetical consumer’s current rate or payment obligations and the rates or payments that would apply if the consumer obtains the advertised product unless the advertisement states the rates or payments that will apply over the full term of the loan.
 - Advertisements that characterize the products offered as “government loan programs,” “government-supported loans,” or otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government-supported or -sponsored loans.
 - Advertisements, such as solicitation letters, that display the name of the consumer’s current mortgage lender, unless the advertisement also prominently discloses that the advertisement is from a mortgage lender not affiliated with the consumer’s current lender.
 - Advertising claims of debt elimination if the product advertised would merely replace one debt obligation with another.
 - Advertisements that create a false impression that the mortgage broker or lender has a fiduciary relationship with the consumer.
 - Foreign-language advertisements in which certain information, such as a low introductory “teaser” rate, is provided in a foreign language, while required disclosures are provided only in English.
- **Section 32 Loans.** In August 2007, the Federal Reserve Board made its annual adjustment to Regulation Z for section 32 loans, effective January 1, 2008. The section 32 requirements apply only if the APR is more than 10 percent (8 percent for first mortgage loans) above the current Treasury yield on securities having the same period to maturity or if the total points and fees payable by the consumer at or before closing exceed the greater of \$561 (formerly \$547) or 8 percent of the loan amount. See ¶ 5.06[1] and Appendix B.

Recent Court Decisions

- *Definition of Creditor.* A couple decisions considered TILA’s definition of “creditor.” *Nevis v. Wells Fargo Bank* (not a closing agent) and *Hodges v. Swafford* (yes to a lender who closes only one HOEPA mortgage loan). See ¶ 1.04[23].
- *Yield Spread Premium.* A federal district court in Pennsylvania confirmed that a yield spread premium should not be separately added to the finance charge. *Davis v. Deutsche Bank National Trust Co.* See ¶ 2.01[1][a].

- *Title Insurance Premium.* A federal district court in Pennsylvania held that a title insurance basic rate was properly disclosed because borrowers failed to show they were entitled to a re-issue rate. *Davis v. Deutsche Bank National Trust Co.* See ¶ 2.01[3].
- *Fees Payable at Closing.* An appeals court in Indiana held that financed fees counted as HOEPA fees “payable at or before closing.” *Hodges v. Swafford.* See ¶ 5.06[1].
- *Use of Wrong Model Rescission Form.* A federal district court in Kentucky joined the line of decisions holding that a lender did not violate TILA by using the “wrong” FRB model notice of right to cancel. *Barrett v. Bank One.* See ¶ 6.03[2].
- *Lender’s Duties After Rescission.* Several courts examined the behavior of creditors who received notices of rescission from their borrowers. *Greenpoint Funding, Inc. v. Bach, First Union National Bank v. Wilson* and *Jones v. REES-MAX.* See ¶ 6.03[4].
- *Conspiracy Theory.* A federal district court in Tennessee denied a motion to dismiss filed by a settlement agency, which was not a “creditor” but might have “indirect liability” under TILA because it may have furthered an alleged predatory lending conspiracy. *Carr v. Home Tech Co, Inc.* See ¶ 10.01.
- *Forgery.* A federal district court in Indiana said a borrower’s assertion that his signature on retail installment contract had been forged would render TILA inapplicable to his transaction. *Holt v. Ford Motor Credit Co.* See ¶ 10.04.
- *Limitations on Action.* Several courts addressed TILA’s one-year and three-year limitations on actions and the doctrine of equitable tolling. *Johnson v. Mortgage Electronic Registration Systems, Inc., Christopher v. First Mutual Corp., Barkley v. Olympia Mortgage Co., Dennis v. Rock Financial, Hernandez v. Hilltop Financial Mortgage, Inc., Gates v. Ohio Savings Bank, and McAnaney v. Astoria Financial Corp.* See ¶¶ 10.10[1] and 10.10[2].