

MEMORANDUM

To: Subscribers to *Mortgage Lending Compliance with Federal and State Guidance*

From: A.S. Pratt & Sons

Subject: Highlights

Enclosed you will find your latest update to *Mortgage Lending Compliance with Federal and State Guidance*. This update brings your manual current by incorporating significant developments that have occurred in the past several months and enhances the manual by including additional materials.

Changes made in this update reflect the following:

- **May 2009 Regulation Z (Truth-in-Lending Act) revisions.** On May 8, 2009, the Federal Reserve Board revised Regulation Z to implement the Mortgage Disclosure Improvement Act of 2008 (MDIA), which was part of the Housing and Economic Recovery Act of 2008, enacted July 30, 2008. The MDIA broadened and added to the requirements of the Board's July 2008 final rule on protections for home mortgage loan borrowers, summarized in Section 1.1.1. Among other things, the MDIA requires early transaction-specific disclosures for closed-end mortgage loans secured by dwellings other than the consumer's principal dwelling and requires waiting periods between the time early disclosures are given and loan consummation. (Previously, early disclosures were only required for closed-end loans that financed the purchase or initial construction of the consumer's principal dwelling subject to the Real Estate Settlement Procedures Act (RESPA) (see Section 1.1.4). Congress made the MDIA requirements effective July 30, 2009, two months earlier than the Board's July 2008 rule. The May revisions also moved up to July 30, 2009 certain requirements of the July 2008 rules, from the originally scheduled October 1, 2009 implementation date:
 - The new requirement that early disclosures be given for all dwelling-secured closed-end loans subject to the RESPA rather than only for "residential mortgage transactions" subject to RESPA (that is, rather than only for loans to finance the purchase or initial construction of the principal dwelling; see Section 1.1.4); and
 - The new requirement that the early disclosures be given *before the consumer pays any fee*, other than a bona fide and reasonable fee for obtaining the consumer's credit history.

The May 2009 revisions require creditors to make good faith estimates of the required disclosures and deliver them or place them in the mail no later than 3 business days after receiving a consumer's application for a dwelling-secured closed-end loan. Consummation of the loan may not occur *until the seventh business day after the delivery or mailing of the disclosures*. If the APR in the good faith estimates changes beyond a specified tolerance for accuracy, the creditor must provide a *corrected disclosure*, which the consumer must receive on or before the third business day before consummation. (See Section 1.1.8.) The disclosures also *must inform* consumers that they are not obligated to complete the transaction simply because disclosures were provided or because a consumer has applied for a loan. The May 2009 revisions allow consumers to expedite consummation to meet a bona fide personal financial emergency. The MDIA, as amended by the Emergency Economic Stabilization Act of 2008, on October 3, 2008, specifies different requirements for mortgage loans secured by timeshare interests. All of these changes required by the MDIA took effect on July 30, 2009.

The MDIA also contained additional disclosure requirements for *variable-rate transactions* not addressed by the May 2009 revisions, as described in Section 1.1.4. The FRB issued proposed rules to implement these requirements in July 2009 in connection with the Board’s comprehensive review of closed-end mortgage disclosures (see Section 1.1.1).

To sum up, the May 8, 2009 revisions, effective as of July 30, 2009, relate to:

- *Early disclosures*. Early disclosures for all dwelling-secured closed loans subject to RESPA. See Section 1.1.4.
 - *Fees*. The requirement that early disclosures be given before the consumer pays a fee. See Section 1.1.4.
 - *Seven-business-day waiting period*. The requirement that consummation of the loan may not occur until the seventh business day after the delivery or mailing of the early disclosures, which must be provided no later than three business days after receiving a loan application. See Section 1.1.4.
 - *Redisclosure*. The redisclosure of early disclosures in certain situations. See Section 1.1.8.
 - *Three-business-day waiting period*. The requirement that consummation of the loan may not occur until the third business day after consummation if corrected early disclosures (redisclosures) have been required. See Section 1.1.8.
 - *New notice with early disclosures*. The required notice: “You are not required to complete this agreement merely because you have received these disclosures or signed a loan application.” See Section 1.1.7.
 - *Waiver of waiting periods*. The opportunity for borrowers to waive or modify the three-business-day and seven-business-day waiting periods. See Section 1.1.4.
- **Comprehensive proposal to amend Regulation Z home-secured lending provisions**. In July 2009, the Federal Reserve Board proposed a comprehensive revision of the home-secured lending provisions of Regulation Z (Truth-in-Lending Act), which would affect both closed-end loans and home equity lines of credit (HELOCs). See Section 1.1.1, “Proposed Changes to Regulation Z Affecting Home-Secured Lending.”
 - **HOEPA threshold adjustment**. In August 2009, the Federal Reserve Board made its annual adjustment to Regulation Z’s total points and fees threshold for section 32 loans, effective January 1, 2010. 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 \$579 (formerly \$583) or 8 percent of the loan amount. *This is the first time in the history of section 32 that the amount decreased*. See Sections 1.1.1 and 1.1.12 and Appendix 1.1A.
 - **RESPA and Regulation X**. The Obama Administration decided to stick with the revisions to Regulation X (Real Estate Settlement Procedures Act) announced by HUD in November 2008, except for the new definition of “required use,” which it has withdrawn for reconsideration. See Chapter 1.3 and Appendix 1.3A.
 - **Flood Insurance Qs and As**. In July 2009, the federal agencies revised their Interagency Flood Insurance Questions and Answers. The document includes a warning that life-of-loan flood hazard determination fees must not be imposed in connection with a loan application that does not close, because such a fee would violate the Real Estate Settlement Procedures Act. See Chapter 1.4 and Appendix 1.4B.

- **FACT Act regulations.** The federal agencies continued their gradual implementation of the Fair and Accurate Credit Transaction Act (FACT Act). In July 2009, they issued regulations regarding the accuracy and integrity of information furnished by lenders to credit reporting agencies. The regulations also address a lender's responsibility to respond when a consumer raises directly with the lender a dispute about the accuracy of information in a credit report. The agencies, in June, issued a set of *Frequently asked Questions: Identity Theft Red Flags and Address Discrepancies*. See Sections 3.2.5, 3.2.6 and 3.2.11.
- **FTC regulation of mortgage lending.** Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act of 2009), signed into law May 22, 2009, requires the FTC to adopt regulations relating to unfair and deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. As of the publication of this update, the FTC has not proposed regulations. See Section 5.3.1.
- **U.S. Supreme Court puts the brakes on preemption, sort of: Law enforcement powers of state attorney general.** The United States Supreme Court held that an OCC regulation was not a reasonable interpretation of the National Bank Act when it interpreted "visitorial powers" to include ordinary enforcement of state law. While a state attorney general may not engage in supervisory activities over national banks and their operating subsidiaries, he or she may act as a law enforcer to enforce a state law against a national bank. *Cuomo v. Clearing House Ass'n*. See Section 8.1A.
- **California.** Effective as of June 15, 2009, the California Foreclosure Prevention Act provides an additional 90-day period for certain loans to allow parties to pursue loan modifications before foreclosure. See Section 8.6.
- **Michigan.** Effective as of July 5, 2009, the Michigan Home Foreclosure Prevention Act provides an extra 90 days for homeowners threatened with foreclosure to work with their lenders on modifying their mortgage loans. See Section 8.24.

Other Recent Developments of Interest

- **HUD Regulation X YSP Disclosure.** On July 29, 2009, a federal district court in the District of Columbia upheld HUD's November 2008 revision of Regulation X insofar as it requires the disclosure of yield spread premiums (YSPs) on the standard Good Faith Estimate, effective January 1, 2010. The court allowed the regulation to stand because the required disclosure was not arbitrary and capricious under the Administrative Procedures Act. The National Association of Mortgage Brokers (NAMB) opposes the new Good Faith Estimate form because of the way it discloses YSPs, claiming it disadvantages brokered loans to the benefit of lender loans. The court noted that the YSP should offset the charges for the other settlement services the broker offers, and a broker in a competitive market should disclose a commensurately smaller change in the "all other settlement services" section of the Good Faith Estimate, with the result being that "the broker and the direct lender should disclose the same amount of overall settlement charges on the first page of the form" for two otherwise identical loans. *Nat'l Ass'n of Mortgage Brokers, Inc. v. Donovan*. See Section 1.3.5.