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In This Issue

◆ Truth-in-Lending & Equal Opportunity Act

Rebutting a Presumption of Delivery.....	1
Consumer Need Not Tender Repay- ment Along With Notice of Rescission	3
Judge Absolves Auto Dealer of T- in-L and ECOA Violations	4
Extension of Maturity of a Pawn Requires No New T-in-L Disclosures.....	6
Regulation Z and Interagency Statement Updates	7

Rebutting a Presumption of Delivery

In a closed-end transaction subject to rescission, the creditor must take care to do a number of things, including the two below if it wants to save itself a lot of trouble:

One, deliver two copies of a Notice of Right to Cancel to each consumer entitled to rescind. (See Reg. Z § 226.23(b)(1).) If a married man obtains a loan secured by the home which he and his wife concurrently own, either the husband or the wife may rescind. (Reg. Z § 226.23(a)(1).) The creditor must give each his own, two copies of the Notice.

Two, get each consumer to sign a statement acknowledging receipt of two copies of the Notice.

The second is important because it creates a presumption that the creditor did, in fact, give each consumer two copies. (See Truth-in-Lending Act § 125(c), 15 U.S.C. § 1635(c).) Nevertheless, the presumption might avail the creditor naught. Despite a consumer's acknowledgment and the presumption it creates, the consumer may challenge the creditor's assertion that it delivered two copies to each consumer entitled to a Notice. If the challenge is successful, it shows a breach of T-in-L which, among other things, extended the time for rescission beyond the normal, three-business-day period for up to three years.

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Editor:
Earl Phillips,
A.B., LL.B., LL.M.,
Professor of Law Emeritus,
Fordham Law School

Legal presumptions are somewhat odd, though logical. If a litigant can prove A, the law will presume B without any additional evidence. If, as stated above, a creditor produces a document signed by a consumer acknowledging receipt of two copies of a Notice of Right to Cancel a closed-end transaction secured by his home, the law presumes that the creditor did, in fact, give the consumer two copies of the Notice. (See Truth-in-Lending Act § 125(c), 15 U.S.C. § 1635(c).) While the presumption stands, the trier of fact (a jury or, if there is no jury, the trial judge) must find that the creditor delivered two copies to the consumer, just as the document states.

The presumption, however, is rebuttable. The consumer can rebut it, according to some judges, simply by asserting under oath that (1) he received no notice at all or only one; and that (2) he placed in a folder all the documents he received from the creditor at the closing without examining them and, when he opened the folder later on, found no copy of the notice or only one copy, rather than the two required. (See Reg. Z § 226.23(b)(1).)

Take the case of a loan to a married man which he and his wife secure by giving the lender a mortgage on the home they co-own. Both spouses attend the closing and both sign a document acknowledging receipt by each of two copies of a Notice of Right to Cancel. Several months after the closing the couple notify the lender and the bank to which the lender has assigned the mortgage that they are rescinding the transaction. Getting no response, the spouses sue to enforce their rescission.

The lender and the assignee defend on the ground that the attempt to rescind came too late because the period for rescission ended on the third business day following the closing. Not so, answer the couple. The husband states under oath that he received only one copy of a Notice of Right to Cancel and the wife, that she received no copy at all. But, respond the lender and assignee, you both signed a document saying each of you received two copies. That raises a presumption that each of you did, in fact, get two copies.

True enough, the couple admit. Nevertheless, they assert that neither thoroughly read or carefully examined the documents they received at the closing to make sure they contained two Notices for each spouse. The husband also states that he placed all the documents in a file folder which, when opened in the course of their lawsuit, contained only one copy of the Notice for him and none for his wife. The acknowledgments of receipt created a presumption that each spouse had received two copies, but the couple's assertions rebutted the presumption, held the judge.

Does rebuttal of the presumption mean that the trier of fact must find that the lender failed to deliver two copies to each spouse? No, it does not. What it means is that the question is open, so the trier of fact must weigh all the evidence produced by the parties at trial—the consumer's testimony, the signed acknowledgments that the creditor delivered two copies, and

whatever other evidence the parties provide—and decide whether the consumer received two copies, or one, or none (though the creditor has the burden of persuading the trier of fact by a preponderance of the evidence that it did, in fact, deliver two copies to each consumer).

A finding that the lender delivered two copies to each spouse, will mean that the couple's attempt to rescind came too late. A finding that the lender did not deliver two copies to each spouse will mean that the time for rescission did not expire three business days after the closing, and had not yet expired when the couple gave notice they were rescinding. In which case, the rescission was timely. (*Pernice-Dembosz v. Countrywide Bank, FSB*, No. 07 C 4654 (N.D. Ill., May 13, 2008)(2008 WL 2062642).)

Comment: The T-in-L Act says “[W]ritten acknowledgment of receipt of any disclosures required by [the Act] by a person to whom information, forms, and a statement is required to be given pursuant to this section (T-in-L Act § 125, 15 U.S.C. § 1635, the section governing rescission) does no more than create a rebuttable presumption of delivery thereof.” (T-in-L Act § 125(c), 15 U.S.C. § 1635(c).) Suppose a consumer signs and dates as of the date of the closing documents acknowledging receipt of a T-in-L Disclosure Statement, an Adjustable Rate Mortgage (ARM) Disclosure which explains the difference between an ARM mortgage and a fixed-rate mortgage, and a Notice of Right to Cancel. The acknowledgments raise presumptions that the creditor did, in fact, deliver each of those three documents at the closing.

The consumer might be able to rebut the presumption, of course. In one case, the judge held the consumer had done so by the combination of (1) the consumer's statement under oath that the lender delivered none of those documents to him at the closing; and (2) the declaration of the notary who had witnessed the signing of all the papers at the closing that, to the best of her recollection, the lender had departed the closing with all the papers and had left none with the consumer. The upshot was the question would go to trial for the trier of fact to decide which would, in turn, decide whether the consumer's attempt to rescind nine months after the closing was timely. (*Kajitani v. Downey Savings and Loan Association*, Civil No. 07-00398 SOM/LEK (May 22, 2008)(2008 WL 2164660).)

Consumer Need Not Tender Repayment Along With Notice of Rescission

There are at least two theories concerning the effect of a consumer's timely notice that he is canceling a transaction. One holds that the notice does not immediately nullify the transaction, the other, that it does. But whichever theory one adopts, it seems clear that Truth-in-Lending does not require the consumer at the time he cancels to tender the money or property he received from the creditor.

Suppose a consumer refinances the mortgage on his home with a new mortgage loan from a different lender on January 12, 2006. On January 19, 2006, the lender uses the proceeds of the new loan—\$491,894.96—to pay off the prior mortgage. On January 23, 2006, the consumer notifies the lender he is rescinding the new loan, but does not tender repayment of the money used to payoff the prior mortgage. The lender refuses to go along with the rescission, arguing that the period for rescission ended on the third business day following the closing. A lawsuit ensues. At the trial, it turns out that the attempt to rescind was timely because the Notice of Right to Cancel the lender gave the consumer at the closing was defective and extended the period for rescission for up to three years.

The trial judge ruled that, (1) despite the timeliness of the rescission, it was ineffective and did not nullify the loan and mortgage. Why? Because it was not accompanied by tender of \$491,894.96 as repayment of the proceeds of the loan. (2) Since the rescission had failed, the loan and mortgage had remained in effect and the consumer had to pay the interest on the loan that had since accrued.

The appellate judge agreed and disagreed. He ruled as to (1) that Truth-in-Lending did not require the consumer to offer immediate repayment of the proceeds of the loan when he notified the lender he was rescinding. Consequently, the failure to do so did not render the rescission ineffective. On the other hand, the notice of rescission did not by itself nullify the loan and mortgage.

The Act states that “When [a consumer] exercises his right to rescind ..., any security interest

given by the [consumer] ... *becomes* void upon such a rescission.” (T-in-L Act § 125(b), 15 U.S.C. § 1635(b)(Emphasis supplied).) Regulation Z likewise provides “When a consumer rescinds a transaction, the security interest ... *becomes* void ...” (Reg. Z § 226.23(d)(1)(Emphasis supplied).) But a consumer has not fully exercised his right to rescind until either the creditor acknowledges the effectiveness of the rescission or a judge rules it effective, said the judge. It is only then that the transaction is cancelled and the security interest “becomes void.” And it is only then that the Act and Regulation require the consumer to tender repayment of the money the lender paid out for the consumer. (See T-in-L Act § 125(b), 15 U.S.C. § 1635(b), & Reg. Z § 226.23(d)(3).)

Well, then, does the consumer have to pay the interest that accumulated up until the time the transaction “became void” as the trial judge had ruled in Part (2) of his opinion? No, held the appellate judge. The Act provides that when an obligor exercises his right to rescind ..., he is not liable for any finance or other charge....” (T-in-L Act § 125(b), 15 U.S.C. § 1635(b). Reg. Z § 226.23(d)(1) is to the same effect.) Having determined that the consumer properly exercised his right to rescind, the trial judge's award of interest, which is a finance charge, directly contravened the letter and spirit of the Act and as such, was erroneous. The appellate judge reversed the award. (*Cornerstone Mortgage, Inc., v. Ponzar*, No. ED 89442 (Mo. App., May 27, 2008)(2008 WL 2097417).) (*At the time this was written the opinion had not been released for publication and might be reheard or transferred, modified, superceded, or withdrawn.*)

Cross Reference: In his ruling on Part (1) of the trial judge's holding, the appellate judge relied heavily on the analysis of a federal trial judge:

The language of the statute and regulation provide that the security interest becomes void when an obligor exercises his or her right to rescind. This assumes that the right to rescind has become perfected, however, and is more than the mere assertion of such a right. Thus, the right to rescind must flow from either the creditor's acknowledgment that such a right is available, or an appropriate decision-maker's determination that it is available. When a lender disputes a borrower's purported right to rescind, the decision-maker must decide whether conditions for rescission have been met. A demand

for rescission is not self-executing. Thus, rescission under TILA is not automatic where a lender or creditor disputes the borrower's or obligor's purported claim of rescission.

(*Anderson v. Delta Funding Corp.*, 316 F.Supp.2d 554, 562-563 (N.D. Ohio 2004)(Emphasis supplied by the *Anderson* judge).)

A different analysis, same result: Under T-in-L, rescission is a three-step process. The first step is taken by the consumer and consists of notifying the creditor that the consumer is rescinding the credit transaction. This immediately nullifies the entire transaction including the creditor's security interest, and extinguishes the consumer's liability for any amount including finance charges. (Reg. Z § 226.23(d)(1).)

The second step is the creditor's. The creditor has 20 days after receipt of the notice of rescission to return to the consumer or credit him for any money or property given anyone in connection with the transaction. For example, any interest or application fee the consumer has paid. (The creditor must also take any action necessary to reflect the termination of its security interest.) (Reg. Z § 226.23(d)(2); Official Staff Comment No. 226.23(d)(2)-1.)

Once the creditor has taken the second step within the 20 days allotted, the consumer must take the third: tender repayment of the money and return of any property he received. (Reg. Z § 226.23(d)(2).)

In short, the first and third steps are separate and distinct steps. The consumer takes the first by giving notice of rescission. This immediately nullifies the transaction even though the creditor disputes the rescission and no judge has as yet ruled that it was effective. Even so, the law does not require the consumer to take the third step at the same time as the first. If the creditor argues that the rescission was ineffective for some reason—that it came after the time for rescission had passed, for instance, the consumer does not have to tender repayment until the judge has found the rescission effective.

In the *Ponzar* case the consumer had paid nothing to anyone in connection with the mortgage loan in question, so there was nothing the lender had to return. The trial judge apparently thought that, since the lender did not have to take the second step separating the first and third, the first and third merged

and, so, required the consumer to tender repayment along with his notice of rescission. But steps one and three are separate and distinct in any event, so Ponzar did not have to tender repayment until a judge ruled that he had given proper, timely notice of rescission which nullified the mortgage loan.

Judge Absolves Auto Dealer of T-in-L and ECOA Violations

Eric Hunter signed a Retail Installment Sales Contract (RISC) for the purchase of a used car from Bev Smith Ford, LLC. The RISC contained the Federal Box with Truth-in-Lending disclosures—the annual percentage rate, finance charge, amount financed, total amount of payments, and the total sale price. It also disclosed the number of payments, amount of each monthly payment and when payments were due. The RISC must have also named Bev Smith as the seller who was offering that credit, although the judge does say so.

The RISC stated, in addition to the above, that [t]his Lease and/or Retail Installment Sales Contract is conditioned pending financial institution (Bank, Sales Finance Company, Credit Union, etc.) funding. This selling motor vehicle dealership DOES NOT LEND MONEY OR ACCEPT MONTHLY PAYMENTS. In aid of this provision, the RISC included a clause which permitted the dealer to rescind the RISC if a financial institution rejected Hunter's request for funding.

A few days after Hunter signed the RISC, the dealer rescinded the contract. The used car Hunter had contracted to buy was a trade-in by a couple, Mr. and Mrs. Christopher Tenore, who had signed a RISC identical to Hunter's for another car. When the dealer rescinded the Tenores's RISC because no one would purchase it, the dealer took the car from Hunter in order to return it to the Tenores. It was clear at this point that no financial institution was going to buy Hunter's RISC, so the dealer rescinded it.

Hunter sued, alleging that the dealer's disclosures did not comply with T-in-L. Both he and the Tenores sued for alleged violations of the Equal Credit Opportunity Act (ECOA), alleging that the dealer should have given them notice of adverse action when it rescinded their RISCs.

Truth-in-Lending

The judge ruled the dealer innocent of any T-in-L violation. He distinguished conditions precedent and conditions subsequent. The former is a contingency which must occur before a contract legally binding the parties comes into existence. The latter is a contingency which will nullify a legally binding contract should it occur.

Was acceptance of Hunter's RISC by a financial institution a condition precedent which had to occur before Hunter was legally obligated to accept and pay for the car? Or did the RISC legally obligate Hunter when he signed it, subject to the condition subsequent that the dealer might rescind if a financial institution refused to purchase it? The judge focused, it seems, on the provision that the contract "is conditioned pending financial institution (Bank, Sales Finance Company, Credit Union, etc.) funding." He construed that as a condition precedent. Given that construction, the ruling that the dealer was guilty of no violation of T-in-L seems correct.

T-in-L requires a creditor to provide a consumer with closed-end disclosures "before the credit is extended." (T-in-L Act § 128(b)(1), 15 U.S.C. § 1638(b)(1).) Regulation Z explains that this means the creditor must provide the disclosures "before consummation of the transaction." (Reg. Z § 226.17(b).) When does consummation occur? At "the time that a consumer becomes contractually obligated on a credit transaction." (Reg. Z § 226.2(a)(13).) And when is that? It depends on state law, not Regulation Z, according to the Official Commentary on the Regulation by the staff of the Federal Reserve Board (FRB). (Comment No. 226.2(a)(13)-1.) The law of the state in question (Florida) permitted conditions precedent.

The dealer had not sold the RISC to a finance company and was not going to. Thus, Hunter had never been contractually obligated by the state law to go through with the deal and buy the truck. That meant that the parties had never "consummated" a credit transaction. It followed, ruled the judge, that the time for T-in-L disclosures had never arrived and, so, the dealer's failure to give the consumer a proper set of disclosures before he signed the RISC, or at any other time, was not a breach of T-in-L.

Cross-reference: A consumer credit transaction subject to a condition precedent is "consummated"

when the consumer signs it, according to the U.S. Court of Appeals for the Fourth Circuit. That is so even if state law does not "contractually obligate" the consumer until the condition precedent is met. The consumer "contractually obligates" himself for T-in-L purposes when he signs the credit agreement, although he signs before the condition is satisfied, ruled the judges. Consequently, to comply with T-in-L, the creditor must give the consumer a disclosure statement before he signs. (*Gibson v. LTD, Inc.*, 434 F.3d 275 (4th Cir., Jan. 11, 2006), reaffirming the court's ruling in *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), reversed on other grounds 543 U.S. 50, 125 S.Ct. 460, 160 L.Ed.2d 380 (2004). Accord: *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060 (11th Cir. 2004). *Contra, Rosa v. Cutter Buick Pontiac GMC of Waipahu*, No. 02-17003, D.C. No. CV-01-00766-DAE/BMK (9th Cir., July 2, 2004)(2004 WL 1543178). *Rosa* was not been published in the *Federal Register* and, therefore, is not a binding precedent in the Ninth Circuit.)

The Equal Credit Opportunity Act

The dealer had not violated the ECOA provision which requires a "creditor" to give notice of adverse action, ruled the judge, because it wasn't a "creditor" for the purpose of adverse action notices.

The dealer was almost certainly a "creditor" under T-in-L (see Reg. Z § 226.2(a)(17), but not under the ECOA. The ECOA's definition of "creditor" (ECOA § 702(c), 15 U.S.C. § 1691a(c)) is complemented by Reg. B § 202.2(l). A "creditor," says the Regulation is "a person who, in the ordinary course of business,

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regularly participates in a credit decision, including setting the terms of the credit.” (Reg. B § 202.2(l).) However, even though a person does not fall within that broad definition, he is a “creditor” for the purposes of sections 202.4(a) & (b), the provisions which prohibit discrimination on the basis of things such as marital status, if he “refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made.”

That is, if an auto dealer does nothing more than arrange for the extension of credit by someone else, it is a “creditor” only for the purposes of the prohibitions on discrimination and is not a “creditor” for the purposes of the law’s other provisions. Such a person is not a “creditor” for the purposes of Regulation B § 202.9(a), the provision requiring a “creditor” to notify an applicant of adverse action and the reasons for the action. Consequently, the failure to provide the notice is not a violation of ECOA.

The judge ruled that the RISCs of the Tenores and Hunter clearly stated that the dealer did not provide financing. That made it clear to the judge that the dealer did not regularly participate in a credit decision, including setting the terms of the credit and, thus, was not a “creditor” obligated to give the Tenores and Hunter notices of adverse action when it rescinded their RISCs. (*Hunter v. Bev Smith Ford, LLC*, No. 07-80665-CIV (S.D. Fla., Apr. 29, 2008)(2008 WL 1925265).)

Cross-reference: An auto dealer was found to be a full-fledged creditor by the U.S. Court of Appeals for the Seventh Circuit who had, therefore, breached ECOA by failing to give the consumer notice of adverse action, but it seems the dealer in that case did more than merely offer the consumer’s contract to financial institutions which refused to buy it. (*Treadway v. Gateway Chevrolet Oldsmobile, Inc.*, 362 F3d 971 (7th Cir., Apr. 2, 2004).)

Extension of Maturity of a Pawn Requires No New T-in-L Disclosures

On October 22, 2005, Bernice Gunn pledged her 1995 Mitsubishi Galant to secure payment of a loan from TitleMax of Alexander City with a term of one month. The four-page pawn ticket, signed by Gunn and a TitleMax agent, disclosed:

- A “Principal Loan Amount” and “Amount Financed” of \$500;
- A monthly interest rate of 15.99% (which would produce interest of 479.95 for the month);
- A “Total of Payments” of \$579.95 (the Amount Finance plus interest for the month) due November 21, 2005; and
- Pawn charges of \$79.95 also due November 21, 2005 (the “Maturity Date” of the loan).

The pawn ticket—the loan agreement—provided that the transaction could be renewed and the maturity date deferred for successive periods of one month. Gunn and TitleMax did, in fact, enter a series of subsequent loan agreements with TitleMax assessing a pawn charge each time.

For each “subsequent loan agreement” TitleMax gave Gunn a “Customer Receipt” which disclosed things such as the amount of the unpaid principal of the loan and the amount of interest then due, and added the two to disclose the total amount due. They also stated that Gunn might choose to redeem the automobile by paying the amount of cash advanced, plus any unpaid, prorated pawnshop charges. Gunn signed the “Customer Receipts.”

Gunn contended that each “Customer Receipt” evidenced a new pawn transaction which refinanced the prior pawn and, accordingly, each required a new set of Truth-in-Lending disclosures, which TitleMax had not provided. TitleMax argued that the subsequent loan agreements were nothing more than renewals of the original pawn transaction and, as such, required no new disclosures. The judge agreed with TitleMax.

The extensions were renewals, not new transactions: The original transaction in October 2005 was a “pawn transaction” as defined by the Pawnshop Act of the state in which the transaction occurred (Alabama). The Act anticipated extensions of the maturity date of a pawn transaction and authorized a pawn charge for each extension, but did not require new pawn tickets when such an extension occurred.

Gunn’s October 2005 pawn ticket itself provided for extension of the pawn transaction. It stated that Gunn could choose not to redeem the automobile on the maturity date and might instead extend the maturity date for another month upon payment of an additional pawn charge. When this was done, the original pawn transaction was renewed and the maturity date was deferred.

All of this made it clear to the judge that the parties’ agreement was to extend the maturity date of the original pawn transaction on the conditions specified by the agreement, with all of the original transaction’s material terms remaining in effect. There was no inconsistency between the state’s Pawnshop Act and Gunn’s pawn ticket because the Act authorized such extensions. The judge concluded, therefore, that the subsequent loan agreements were actually extensions of Gunn’s original pawn transaction which merely deferred that transaction’s maturity date by a month.

Deferral of maturity requires no T-in-L disclosures: The T-in-L Act provides that, if information in a disclosure is subsequently rendered inaccurate as the result of any agreement subsequent to the delivery of the disclosures, the resulting inaccuracy does not constitute a violation of the Act. (T-in-L Act § 124, 15 U.S.C. § 1634.) As Gunn made partial payments of principal, the “Customer Receipts” covering extensions of the pawn would disclose as the principal then due an amount different from the amount disclosed by the October 2005 pawn ticket. So what? That would not require TitleMax to make new disclosures. Oh, but it would if a subsequent loan agreement were a “refinancing” and that’s precisely what her subsequent loan agreements were, argued Gunn. The judge thought not.

A “refinancing” occurs:

[W]hen an existing obligation ... is satisfied and

replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. (Reg. Z § 226.20(a) & Official Staff Commentary No. 226.20(a)-1.)

To be a “refinancing,” a new obligation must completely replace the prior one. In Gunn’s case, there was no cancellation of the original, October 2005 pawn obligation. The original pawn ticket was renewed and extended a number of times. Its maturity date was deferred each time. The original pawn ticket nevertheless survived the deferrals and was never cancelled. Therefore, the “Customer Receipts” Gunn obtained at each subsequent loan agreement were nothing more than receipts evidencing payments under the October 2005 pawn agreement she had originally entered. Regulation Z make it clear, ruled the judge, that no new T-in-L disclosures were required. (*Gunn v. Titlemax of Alabama, Ind.*, No. 3:07-cv-233-WKW, Bankruptcy No. 06-80646, Adversary No. 06-08049 (M.D. Ala., Mar. 31, 2008)(2008 WL 900972).)

Regulation Z and Interagency Statement Updates

Regulation Z. On June 14, 2007, the Federal Reserve Board published proposed amendments of Regulation Z and the commentary on the regulation by the Board’s staff following a comprehensive review of the rules for open-end credit which is not secured by the consumer’s home. Except as otherwise noted, the proposed changes apply only to open-end credit. They would:

- Require disclosures accompanying credit card applications and solicitations to highlight fees and the reasons for application of penalty rate, e.g., late payment.
- Require creditors to summarize key terms at the opening of an account and when they changed terms.
- Identify specific fees which creditors must disclose to consumers in writing before opening an account.

- Give creditors flexibility regarding how and when to disclose other fees imposed as part of the open-end plan.
- Require periodic statements to break out costs for interest and fees.

Two alternatives were proposed dealing with the “effective” or “historical” annual periodic rate disclosed on periodic statements.

Rules of general applicability, such as the definition of open-end credit and the procedures for resolving disputes, would apply to all open-end plans, including home-equity lines of credit. Rules regarding the disclosure of debt cancellation and debt suspension agreements would be revised for both closed-end and open-end credit transactions. Finally, loans taken against employer-sponsored retirement plans would be exempt from Truth-in-Lending coverage. (72 Fed. Reg. 32948.)

The Board has now proposed additional revisions which:

- Address creditors’ responsibilities to establish reasonable instructions for receiving timely pay-

ments and when a due date falls on a weekend or holiday.

- Address creditors’ responsibilities when investigating a claim of unauthorized transactions or an alleged billing error.
- Require advertisements of deferred interest plans to provide additional information about how interest could be imposed. (73 Fed. Reg. 28866 (May 19, 2008).)

Illustrations of Consumer Information for Hybrid Adjustable Rate Mortgage Products. The Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision have published four documents setting forth illustrations which are intended to assist institutions in implementing the consumer protection portion of the Interagency Statement on Subprime Mortgage Lending adopted on June 10, 2007 (72 Fed. Reg. 37569). The illustrations are not model forms, however, and institutions may choose not to use them. (73 Fed. Reg. 30997 (May 29, 2008).)