

Friends and Clients,

The Federal Reserve announced on May 8, 2009 **(emphasis)**:

The Federal Reserve Board on Thursday approved final rules that revise the disclosure requirements for mortgage loans under Regulation Z (Truth in Lending). The revisions implement the Mortgage Disclosure Improvement Act (MDIA), which was enacted in July 2008 as an amendment to the Truth in Lending Act (TILA).

The MDIA seeks to ensure that consumers receive cost disclosures earlier in the mortgage process. In several respects, the MDIA is substantially similar to final rules issued by the Board in July 2008. However, the MDIA also broadens and adds to those regulatory requirements. The final rule largely follows a proposal issued by the Board in December 2008. Under the MDIA, creditors must comply with the new provisions on **July 30, 2009**. The Board's implementing regulations apply to dwelling-secured consumer loans for which a creditor receives an application on or after July 30, 2009.

The MDIA requires creditors to give **good faith estimates of mortgage loan costs ("early disclosures")** [MP COMMENT: This reference is to the initial TIL disclosure and not the GFE.] within three business days after receiving a consumer's application for a mortgage loan **and before any fees are collected from the consumer, other than a reasonable fee for obtaining the consumer's credit history**. These requirements are consistent with the Board's July 2008 final rule, which applied to loans secured by a consumer's principal dwelling. **The MDIA broadens this requirement by also requiring early disclosures for loans secured by dwellings other than the consumer's principal dwelling, such as a second home.**

In addition, the rules would implement the MDIA's requirements that:

 Creditors wait **seven business days** after they provide the early disclosures **before closing the loan**; and

 Creditors provide **new disclosures with a revised annual percentage rate (APR), and wait an additional three business days before closing** the loan, if a change occurs that makes the APR in the early disclosures **inaccurate** beyond a specified tolerance.

The rules would permit a consumer to expedite the closing to address a personal financial emergency, such as a foreclosure.

The notice that will be published in the *Federal Register* is attached. Publication is expected to occur soon.

Link: <http://www.federalreserve.gov/newsevents/press/bcreg/20090508a.htm>

Here are selected parts of the new Reg Z amendments and Official Staff Commentary with my **comments** and **(emphasis)**. See the link provided at the end for the full text of the publication:

PART 226--TRUTH IN LENDING (REGULATION Z)

2. Section 226.2 is amended by revising paragraph (a)(6) to read as follows:

Sec. 226.2 Definitions and rules of construction.

(a) * * *

(6) Business Day means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under Sec. Sec. 226.15

and 226.23, and for purposes of Sec. 226.19(a)(1)(ii), Sec. 226.19(a)(2), and Sec. 226.31, the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as 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.

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Subpart C--Closed-End Credit

3. Section 226.17 is amended by revising paragraph (f) to read as follows:

Sec. 226.17 General disclosure requirements.

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(f) Early disclosures. If disclosures required by this subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose before consummation (subject to the provisions of Sec. 226.19(a)(2) and Sec. 226.19(a)(5)(iii)):

(1) Any changed term unless the term was based on an estimate in accordance with Sec. 226.17(c)(2) and was labeled an estimate;

(2) All changed terms, if the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed earlier by more than $\frac{1}{8}$ of 1 percentage point in a regular transaction, or more than $\frac{1}{4}$ of 1 percentage point in an irregular transaction, as defined in Sec. 226.22(a). [MP COMMENT: Remember the Official Staff Commentary for 226.22(a)(3) that defines "irregular transactions". When describing "irregular transactions" the Commentary provides "It does not apply, however, to loans with variable-rate features where the initial disclosures are based on a regular amortization schedule over the life of the loan, even though payments may later change because of the variable-rate feature." Consequently variable rate loans with regular amortization only have a $\frac{1}{8}$ percentage point tolerance.]

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4. Section 226.19 is amended by revising paragraph (a) to read as follows:

Sec. 226.19 Certain mortgage and variable-rate transactions.

(a) Mortgage transactions subject to RESPA--(1)(i) Time of disclosures. In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq.) that is secured by the consumer's dwelling, other than a home equity line of credit [MP COMMENT: The coverage has broadened. Refinances and 2nd homes are now included. Not HELOCS. Not "Business Purpose" or rental properties not owner occupied (that is, in which the owner does not expect to live for more than fourteen days during the coming year.)] subject to Sec. 226.5b or mortgage transaction subject to paragraph (a)(5) of this section, the creditor shall make good faith estimates of the disclosures required by Sec. 226.18 and shall deliver or place them in the mail not later than the third business day after the creditor receives the consumer's written

application. [MP COMMENT: This is the same old "3 day initial disclosure" rule.]

(ii) Imposition of fees. Except as provided in paragraph (a)(1)(iii) of this section, neither a creditor nor any other person may impose a fee on a consumer in connection with the consumer's application for a mortgage transaction subject to paragraph (a)(1)(i) of this section before the consumer has received the disclosures [MP COMMENT: See my "Over disclosure" comment below.] required by paragraph (a)(1)(i) of this section. If the disclosures are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed. [MP COMMENT: This is a new presumption if "snail mail" regular mail is used. The presumption can be rebutted with evidence of actual receipt if the disclosures were delivered by courier or E-sign compliant email.]

(iii) Exception to fee restriction. A creditor or other person may impose a fee for obtaining the consumer's credit history before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section, provided the fee is bona fide and reasonable in amount. [MP COMMENT: This is new. A lender cannot except any upfront fees, other than the credit report, from the borrower until the borrower receives the initial disclosures.]

(2) Waiting periods for early disclosures and corrected disclosures.

(i) The creditor shall deliver or place in the mail the good faith estimates required by paragraph (a)(1)(i) of this section not later than the seventh business day before consummation of the transaction. [MP COMMENT: This is the new "7 days from initial disclosure to closing" required time period.]

(ii) If the annual percentage rate disclosed under paragraph (a)(1)(i) of this section becomes inaccurate [MP COMMENT: See discussion re "over disclosures" below.]

, as defined in Sec. 226.22, the creditor shall provide corrected disclosures with all changed terms. The consumer must receive the corrected disclosures no later than three business days before consummation. If the corrected disclosures are mailed to the consumer or delivered to the consumer by means other than delivery in person, the consumer is deemed to have received the corrected disclosures three business days after they are mailed or delivered. [MP COMMENT: The preamble to the amended regs provide:

A creditor is not required to use the presumption of receipt to determine when the waiting period required by Sec. 226.19(a)(2)(ii) begins. Thus, if a creditor delivers corrected disclosures electronically consistent with the E-Sign Act or delivers disclosures by overnight courier, the creditor may rely on evidence of actual delivery (such as documentation that the mortgage loan disclosure was delivered by certified mail or overnight delivery or e-mail (if similar documentation is available)) to determine when the three-business-day waiting period begins.

See also our P&P e-disclosure service below. "Snail mail" regular mail will require the lender to assume the borrower does not receive the disclosures for 3 business days after the lender places them in regular mail.

(3) Consumer's waiver of waiting period before consummation. If the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency, the consumer may modify or waive the seven-business-day waiting period or the three-business-day waiting

period required by paragraph (a)(2) of this section, after receiving the disclosures required by Sec. 226.18. To modify or waive a waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited. [MP COMMENT: Use the same standard as exceptions to a borrower's Right of Rescission. The regs mention allowed waivers should include granting a waiver to avoid "foreclosure". No preprinted forms. Each borrower must waive his/her right.]

(4) Notice. Disclosures made pursuant to paragraph (a)(1) or paragraph (a)(2) of this section shall contain the following statement: "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application." The disclosure required by this paragraph shall be grouped together with the disclosures required by paragraphs (a)(1) or (a)(2) of this section.....[MP COMMENT: This new required disclosure MUST be included in the initial TIL and MAY be included in the final TIL. This new statement MUST be grouped together with the other disclosures required by 226(19)(a)(1) [the 226.18 initial disclosures] and 226.19(a)(2)[the corrected disclosures]]

(5) Timeshare plans. In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 et seq.) that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53(D)):

(i) The requirements of paragraphs (a)(1) through (a)(4) of this section do not apply;

(ii) The creditor shall make good faith estimates of the disclosures required by Sec. 226.18 before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier; and

(iii) If the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed under paragraph (a)(5)(ii) of this section by more than $\frac{1}{8}$ of 1 percentage point in a regular transaction or more than $\frac{1}{4}$ of 1 percentage point in an irregular transaction, as defined in Sec. 226.22, the creditor shall disclose all the changed terms no later than consummation or settlement.
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Supplement I to Part 226--Official Staff Interpretations

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Subpart A--General

Sec. 226.1 Authority, Purpose, Coverage, Organization, Enforcement and Liability.

Paragraph 1(d)(3)

1. Effective date. The Board's amendments to Regulation Z published on May 19, 2009 apply to covered loans (including refinance loans and assumptions considered new transactions under Sec. 226.20) for which the creditor receives an application on or after July 30, 2009.) [MP COMMENT: Qualifying assumptions are now covered.]

xvi. The notice set forth in Sec. 226.19(a)(4), in a closed-end transaction not subject to Sec. 226.19(a)(1)(i). In a mortgage transaction subject to Sec. 226.19(a)(1)(i), the creditor must disclose the notice contained in Sec. 226.19(a)(4) grouped together with the disclosures made under Sec. 226.18. See comment 19(a)(4)-1.

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Sec. 226.19 Certain Mortgage and Variable-Rate Transactions.

19(a)(1)(i) Time of disclosure.

3. **Written application.** Creditors may rely on RESPA and Regulation X (including any interpretations issued by HUD) in deciding whether a ``written application'' has been received. In general, Regulation X defines ``application'' to mean the submission of a borrower's financial information in anticipation of a credit decision relating to a Federally related mortgage loan. See 24 CFR 3500.2(b). An application is received when it reaches the creditor in any of the ways applications are normally transmitted--by mail, hand delivery, or through an intermediary agent or broker. (See comment 19(b)-3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker.

4. **Denied or withdrawn applications.** The creditor may determine within the three-business-day period that the application will not or cannot be approved on the terms requested, as, for example, when a consumer applies for a type or amount of credit that the creditor does not offer, or the consumer's application cannot be approved for some other reason. **In that case, or if the consumer withdraws the application within the three-business-day period, the creditor need not make the disclosures under this section.** If the creditor fails to provide early disclosures and the transaction is later consummated on the original terms, the creditor will be in violation of this provision. If, however, the consumer amends the application because of the creditor's unwillingness to approve it on its original terms, no violation occurs for not providing disclosures based on the original terms. But the amended application is a new application subject to Sec. 226.19(a)(1)(i).

5. **Itemization of amount financed.** In many mortgage transactions, the itemization of the amount financed required by Sec. 226.18(c) will contain items, such as origination fees or points, that also must be disclosed as part of the good faith estimates of settlement costs required under RESPA. Creditors furnishing the RESPA good faith estimates need not give consumers any itemization of the amount financed.

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Link: <http://edocket.access.gpo.gov/2009/pdf/E9-11567.pdf>

"Business Days"

There are now 2 definitions for "business day". The "general definition" of business day is defined as a day when the creditor's offices are open to the public for carrying on substantially all of its business functions. This definition is applicable to the mailing of early disclosures ("initial disclosure"). The new "precise

definition" is used to determine the 7 day waiting period before consummation, and the three day waiting period for redisclosures. The "precise definition" is all calendar days except Sundays and the Federal legal holidays specified in 5 U.S.C. 6103(a) i.e. four Federal legal holidays that are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, Federal offices and other entities might observe the holiday on the preceding Friday (July 3). In cases where the more precise rule applies, the observed holiday (in the example, July 3) is a business day.

Here are some examples that are provided in the Commentary:

Reg Z 226.19

Timing of fees

For example, assuming that there are no intervening legal public holidays, a creditor that receives the consumer's written application on **Monday** and mails the early mortgage loan disclosure on Tuesday may impose a fee on the consumer **after midnight on Friday**

Consummation

No correction

For example, if a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, consummation may occur on or after Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures.

With corrections before closing

For example, assume a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, and the creditor then delivers corrected disclosures in person to the consumer on Wednesday, June 3. Although Saturday, June 6 is the third business day after the consumer received the corrected disclosures, consummation may not occur before Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosure

For example, assume consummation is scheduled for Thursday, June 11 and the early disclosures for a regular mortgage transaction disclose an annual percentage rate of 7.00%:

i. On Thursday, June 11, the annual percentage rate will be 7.10%. The creditor is not required to make corrected disclosures under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.15%. The creditor must make corrected disclosures so that the consumer receives them on or before Monday, June 8.

Basis for APR comparison and 3 business day waiting period

For example, assume consummation for a regular mortgage transaction is scheduled for Thursday, June 11, the early disclosures provided in May stated an annual percentage rate of 7.00%, and corrected disclosures received by the consumer on Friday, June 5 stated an annual percentage rate of 7.15%:

i. On Thursday, June 11, the annual percentage rate will be 7.25%, which exceeds the most recently disclosed annual percentage rate by less than the applicable tolerance. The creditor is not required to make additional corrected disclosures or wait an additional three business days under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.30%, which exceeds the most recently disclosed annual percentage rate by more than the applicable tolerance. The creditor must make corrected disclosures such that the consumer receives them on or before Monday, June 8

Waivers and timing

Examples of waivers within the seven-business-day waiting period. Assume the early disclosures are delivered to the consumer in person on Monday, June 1, and at that time the consumer executes a waiver of the seven-business-day waiting period (which would end on Tuesday, June 9) so that the loan can be consummated on Friday, June 5:

i. If the annual percentage rate on the early disclosures is inaccurate under § 226.22, the creditor must provide a corrected disclosure to the consumer before consummation, which triggers the three-business-day waiting period in § 226.19(a)(2)(ii). After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 5.

Examples of waivers made after the seven-business-day waiting period. Assume the early disclosures are delivered to the consumer in person on Monday, June 1 and consummation is scheduled for Friday, June 19. On Wednesday, June 17, a change to the annual percentage rate occurs:

i. If the annual percentage rate on the early disclosures is inaccurate under § 226.22, the creditor must provide a corrected disclosure to the consumer before consummation, which triggers the three-business-day waiting period in § 226.19(a)(2). After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 19.

ii. If a change occurs that does not render the annual percentage rate on the early disclosures inaccurate under § 226.22, the creditor must disclose the changed terms before consummation, consistent with § 226.17(f). Disclosure of the changed terms does not trigger an additional waiting period, and the transaction may be consummated on Friday, June 19 without the consumer giving the creditor an additional modification or waiver.

New P&P Audits

This office will audit for compliance with the new "3 day" and "7 day" waiting periods.

We will ask for the date when the early disclosures were received by the borrower (actual receipt date if sent via e-disclosure, express mail or courier; presumed to be 3 days after mailed by regular mail). The borrower must also have had at least 3 business days to review a corrected TIL disclosure. If the required 7 and 3 business days have not elapsed from borrower receipt to scheduled closing then the following warning will show:

WARNING: **Early Closing Date.** Reg Z requires 7 business days from the date the early Reg Z disclosures were sent and 3 business days from the date the last Reg Z corrected disclosures were received by the consumer before the transaction will be eligible for closing.

This is a "soft" audit warning and will allow the docs to be ordered. This will allow for "waiver" situations.

We will also ask for the APR of the last TIL disclosure received by the borrower. If the last TIL disclosure indicated a lower APR than the allowed tolerance the following warning will show:

WARNING: **APR Not Within Allowed Tolerance.** The previously disclosed Annual Percentage Rate (APR) is not accurate. Lender must provide corrected Reg Z disclosures and wait 3 business days after the consumer receives them before closing.

This is a "hard" audit warning. Because a borrower cannot waive this requirement, documents will not be released until this condition is satisfied.

"Over Disclosures"

The new MEDIA-TILA changes effective July 30, 2009 in pertinent part provide:

FEDERAL RESERVE SYSTEM
12 CFR Part 226
[Regulation Z; Docket No. R-1340]
Truth in Lending
AGENCY: Board of Governors of the Federal Reserve System.
ACTION: Final rule; official staff commentary. (**emphasis**)

Page 23293:

Commenters requested guidance on whether corrected disclosures are required if the APR initially disclosed under Sec. 226.19(a)(1)(i) overstates the actual APR. Comment 19(a)(2)(ii)-1 provides that corrected disclosures are **not required** when the APR previously disclosed is considered accurate under the tolerances in Sec. **226.22.**

Sec. 226.22 of Reg Z in pertinent part provides (**emphasis**):

§226.22: Determination of Annual Percentage Rate (01/01/97)

- (4) **Mortgage loans.** If the annual percentage rate disclosed in a transaction secured by real property or a dwelling varies from the actual rate determined in accordance with paragraph (a)(1) of this section, in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, the disclosed annual percentage rate **shall also be considered accurate if:**
 - (i) The rate results from the disclosed finance charge; and

- (ii) (A) **The disclosed finance charge would be considered accurate under §226.18(d)(1); or**
- (B) For purposes of rescission, if the disclosed finance charge would be considered accurate under §226.23(g) or (h), whichever applies.

Sec. 226.18(d)(1) of Reg Z in pertinent part provides (**emphasis**) :

§226.18: Content of Disclosures (01/01/97)

(d) *Finance charge.* The *finance charge*, using that term, and a brief description such as "the dollar amount the credit will cost you."

(1) *Mortgage loans.* In a transaction secured by real property or a dwelling, the disclosed finance charge and other disclosures affected by the disclosed finance charge (including the amount financed and the annual percentage rate) **shall be treated as accurate if the amount disclosed as the finance charge:**

(i) is understated by no more than \$100; or

(ii) is greater than the amount required to be disclosed.

(2) *Other credit.* In any other transaction, the amount disclosed as the finance charge shall be treated as accurate if, in a transaction involving an amount financed of \$1,000 or less, it is not more than \$5 above or below the amount required to be disclosed; or, in a transaction involving an amount financed of more than \$1,000, it is not more than \$10 above or below the amount required to be disclosed.

Although, it takes about 3 steps to get there, but it is my opinion that **"over-disclosed/overstated"** TILA-Reg Z disclosures are considered accurate for MDIA purposes.

You may, and probably should, have a more conservative loan origination policy than the reg requires. You certainly do not want to be guilty of fostering a "pattern or practice" of over-disclosing to avoid compliance requirements.

However, I think it is important for management to be able to distinguish between the "law" and "policy" when later considering if a certain situation merits an exception.

e-Disclosures

We have a new e-disclosure service that will be available by mid July that will allow a lender to:

- send our P&P TILA-Reg Z disclosure, or
- the lender's own TILA-Reg Z disclosure

via email compliant with the E-Sign Act. This standard is not to be confused with sending disclosures via regular email. Among other things, E-Sign requires certain security and borrower attribution procedures not associated with regular email transmittals.

Proper e-disclosures have the same evidentiary status as courier and express mail receipts. E-disclosures, express mail and courier receipts will allow lender to use "date of actual borrower receipt" rather than the "3 day presumption of receipt" required by lender in establishing 1) the date allowed to collect upfront fees (other than a credit report), and 2) the closing date after "redisclosure" 3 business days prior to consummation. E-

disclosures, express mail and courier receipts will not minimize the required 3 day period for redisclosure, but will prevent that 3 day period from being 6 days (3 day borrower review period+3 day presumption of receipt if redisclosure sent by regular mail).

Please check our P&P e-disclosure link: <http://www.ppdocs.com/eDsiclosure.aspx>

The fee for this new service is \$10. This fee cannot be passed on to the borrower.

I hope you find this helpful. I apologize for all the colors and footnotes in this memo. However, these are very complex changes to an already very complicated regulation.

Thanks,

Mike

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