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Truth in Lending

2007 Supplement

Editor
Alvin C. Harrell

2007 Preface

This year we welcome a new update author for Chapters 1 and 2, Eric L. Johnson of Phillips McFall McCaffrey McVay & Murray, P.C., in Oklahoma City. Eric teaches Consumer Law as an Adjunct Professor at Oklahoma City University School of Law, and was chosen by Fred Miller to continue Fred's work in updating these chapters (which provide a handy overview and perspective on TIL and recent developments). Our thanks to Fred for his work on this book and the Supplement, spanning many years, and to Eric for the fine job of updating Chapters 1 and 2 for 2007.

A significant part of the update to Chapter 1 is new material at ¶1.05[2], describing the Board's 2007 Proposed Rule on Electronic Disclosures. This promises to be a topic of extensive consideration throughout 2007 and perhaps beyond. The updates to Chapter 1 and 2 also include a comprehensive update of case law developments, making these chapters an excellent starting point for research on TIL developments.

Chapter 3, Determining the Finance Charge, was again updated by James A. Huizinga and John K. Van De Weert of Sidley Austin LLP, in Washington, D.C. These changes are again extensive, reflecting the continuing stream of TIL litigation on this issue. The changes appear throughout Chapter 3 in the Supplement, but are most pronounced in: ¶3.02[1] (The All-Inclusive Test); ¶3.02[2] (General Exclusions from the Finance Charge); ¶3.03[2] (The Exclusions, for Real Estate and Residential Mortgage Exclusions); ¶3.06[1] (Accuracy Tolerances, for Calculation of the Finance Charge); and ¶3.08 (A Policy Precaution). The latter notes the Board's 2007 Proposed Rule, proposing extensive revisions to the Regulation Z rules governing open-end credit (also discussed in Chapter 7 of the 2007 Supplement).

Chapter 4 (Annual Percentage Rates) was again updated by Scott Johnson and Therese G. Franzen of Franzen and Salzano, P.C., Norcross, Georgia. This update relates to ¶4.03 (Closed-End APRs), and affects ¶4.03[1], [3], and [4]. There were no major revisions to Chapter 5.

Chapter 6 (Transactions Involving Real Estate and Dwellings) was comprehensively updated by Joseph M. Kolar, Jeffrey P. Naimon, and Kirk D. Jensen of Buckley Kolar LLP, Washington, D.C. The changes appear throughout Chapter 6 (except ¶6.09, which was updated separately, as noted below), including extensive case law up dates. Affected issues include: ¶6.01[5] (the Challenge of Disclosure Reform); ¶6.01[6] (The Challenge of Judicial Interpretation); ¶6.03[3] (Mortgage Insurance, in Finance Charge Computation and Disclosure); ¶6.03[4] (Other Exclusions, in Finance Charge Computation and Disclosure); ¶6.06[2][b] (Timing of Disclosures, for Early Estimated Disclosures in Residential Mortgage Transactions); and ¶6.05 (Variable Rate Features).

The material at ¶6.09 on High-Cost Mortgage Loans was again updated by Laura Hobson Brown and Bennet S. Koren, of McGlinchey, Stafford in New Orleans, Louisiana. Again, this update is reflected throughout this material, updating the case law citations and text to note recent developments under HOEPA, the TIL Act, and Regulation Z.

John Culhane, Jr. of Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, Pennsylvania, updated Chapter 7 (Open-End Credit Disclosures) and Chapter 9 (Billing Error Resolution). The Chapter 7 update includes both the Board's proposed rulemaking as part of a comprehensive review of the TIL rules governing open-end credit (also noted above with respect to Chapters 1 and 3), at 7.01, and litigation updates at ¶¶7.02[3][ii], 7.04[2][a] and [b], 7.04[6][b], and 7.09[1][a]. The Chapter 9 updates include case law developments reported at ¶¶9.02[1], 9.02[2], and 9.04[3][b]. The Board's proposal is likely to result in major revisions to Chapter 7 next year.

The Right of Rescission continues to be an active issue in the TIL litigation, and Oklahoma City University School of Law Professor Daniel J. Morgan has again provided a comprehensive update of Chapter 8 on this subject. Again the changes are widespread and appear throughout the Chapter, affecting virtually every aspect of this issue. Changes to Chapter 10 (Claims and Defenses of Consumers Against Card Issuers) were deemed unnecessary this year, but for a general discussion of these issues, *see* Laurie A. Burlingame, *Getting to the Truth of the Matter, Revising the TILA Credit Card Disclosure Scheme to Better Protect Consumers*, 61 Consumer Fin. L.Q. Rep. ___ 2007; and the Appendix to Chapter 15 in this Supplement (noted below). Chapter 11 was not updated this year.

Chapter 12 (Private Remedies for TIL Violations) was again comprehensively updated by John L. Ropiequet of Arnstein & Lehr LLP in Chicago, Illinois. Once again these revisions are comprehensive, with changes through-out the chapter. Particular attention is called to the extensive updates at: ¶12.04[2] (Statutory Damages); ¶12.05[3] (Creditor Defenses (Timely Correction); ¶12.06[3][b] (Liability for HOEPA violations); ¶12.06[3][e] (Potential Litigation Issues); a new ¶12.06[3][e][v] (Due Diligence); ¶12.06[4][b] (Claims for Rescission under the FTC "Holder" Rule); and ¶12.06[5] (Assignee Liability under State Law).

Jeffrey P. Taft, of Mayer, Brown, Rowe & Maw LLP, in Washington, D.C., again updated Chapters 13 and 15 (there were no updates to Chapter 14 this year). The update to Chapter 13 (Public Enforcement) includes reference to a recent FTC enforcement action at ¶13.02[2][b], note 27. The updates to Chapter 15 (Summary of TILA Regulation and Litigation Developments) include new material at ¶15.04[2][f] (Extinguishing the Right to Rescind) and a new ¶15.04[2][g] (Class Certification for Rescission Claims).

A new feature in this year's Supplement is an Appendix to Chapter 15, summarizing 2006 TIL caselaw developments, provided by Lynette I. Hotchkiss, Richard Hernandez, Thomas J. Kearney, Mark Emanuelson, and Angela J. Cheek. This is reprinted with permission from an article in the *Consumer Fi-*

nance Law Quarterly Report, in turn derived from materials presented at the January, 2007 meeting of the Consumer Financial Services Committee of the ABA Section of Business Law, at Dana Point, California.

This Appendix is a departure from our usual practice, which is to focus on a reasonable number of the most important developments and note them at the appropriate places in the text. This provides a representation of the state of the law, presented in an orderly manner that allows the reader to conveniently identify issues and developments relevant to his or her area of research interest. The sheer volume of TIL litigation means that not every case can be noted, without the risk of creating information overload.

We have decided to include this 2007 Appendix in part to provide an alternative approach for those seeking a comprehensive snapshot of the 2006 litigation. This raises another point: While each year's Supplement is largely cumulative, it is not entirely so. Each year some existing material is removed, usually but not always replaced by updated material on the same subject. Thus each Supplement may have unique material not included the following year. For example, the Appendix to Chapter 15 in this 2007 Supplement (summarizing the 2006 case law) may not be repeated in next year's Supplement. This is a reason to retain each year's Supplement, even after the next Supplement has been published.

Again, thanks to the 2007 update authors, and the ABA Section of Business Law and its editors, for their extensive work and for making this Supplement possible. We hope that it will help to make this area of law just a little bit more comprehensible.

CHAPTER 1

Overview of Truth in Lending

2007 Update by Eric L. Johnson
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¶ 1.01 Scope of Truth in Lending Act; Content

The Truth in Lending Act (TIL Act) was the first major venture of Congress into the subject of consumer credit regulation. It is in a very real sense pioneering legislation; it explored new territory, and other federal consumer credit laws followed in its path. There were, to be sure, some experiments with credit disclosure laws in the states before the TIL Act took effect nationwide in 1969, but the main effort of the states was in other areas, such as rate regulation and the control of creditor practices. Thus, the scope, scale, and consequences of the federal legislation dwarf the state disclosure initiatives. The TIL Act has been amended a number of times, including the substantial revisions enacted in 1980 as the Truth in Lending Simplification and Reform Act (Simplification Act). With each amendment the TIL Act assumes a greater prominence in the area of consumer credit regulation.

Applicable to virtually every form of consumer credit transaction—from home mortgages to small loans to credit card plans to even pawn transac-

tions[1]—the TIL Act commands nationwide uniformity of disclosure, and the rescission provisions as well as later amendments regulate certain creditor practices. It has produced, since 1969, a more standardized vocabulary for credit transactions; compliance headaches for creditors seeking to fathom the intricate rules and subrules of the TIL Act and its attendant regulations, commentary, and judicial constructions; thousands of lawsuits; and probably some real increases in consumer sophistication about the credit transactions they enter.

The primary purpose of the TIL Act is to promote the informed use of consumer credit.[2] It does this by requiring disclosures about the terms and costs of consumer credit transactions. But the TIL Act is truly an eclectic consumer protection law. Although its title suggests a pure disclosure purpose, the TIL Act contains a number of substantive regulatory provisions to prevent perceived abuses that could not be completely addressed through mandatory disclosures. For example, the Act includes qualified or absolute prohibitions on prepayment penalties, balloon payments, increases in interest upon default, negative amortization, prepaid payments, extending credit without adequate consideration of repayment ability, and direct lender to contractor payments in certain high rate/high fee residential mortgages; limitations on acceleration and changes in terms in home equity plans and reverse mortgages; and limitations on the liability of a cardholder for unauthorized use and on the ability of a card issuer to enforce payment if there is a valid defense to payment. But these provisions do not constitute a structured, systematic regulatory scheme for consumer credit; rather they are limited federal responses to perceived problem areas. A substantial portion of what would be considered "consumer credit law" remains at the state level, including most aspects of rate regulation (usury laws). In fact the relationship between the federal TIL Act and the mass of residual state credit laws has been, and continues to be, one of the most perplexing subissues the law has produced.[3]

The umbrella title of the TIL Act covers at least five distinct types of provisions. All of these are discussed in detail through the remainder of this book, but it is useful to catalog them here.

1. The range of transactions covered by the TIL Act is discussed in detail in chapter 2. What constitutes a "transaction" can be quite a subtle issue. For example, it probably is no surprise that a refinancing is a new transaction (*see* Porter v. Mid-Penn Consumer Discount Co. (*In re* Porter), 961 F.2d 1066 (3d Cir. 1992)), but what is considered as a refinancing is much less obvious. *See* Regulation Z § 226.20(a). Nor is it obvious that a creditor's purchase of unauthorized insurance and addition of the premiums to a debtor's existing indebtedness is a new transaction requiring new disclosures. Travis v. Boulevard Bank, 880 F. Supp. 1226 (N.D. Ill. 1995). *See also* primary text ¶ 2.01 note 2.

2. TIL Act § 102, 15 U.S.C. § 1601, Regulation Z § 226.1(b).

3. *See generally* Miller & Rohner, *In Search of a Uniform Policy—State and Federal Sources of Consumer Financial Services Law,* 37 Bus. Law. 1415 (1982).

[1] Disclosure of Credit Costs and Terms

The original purpose of the proposals that became the TIL Act was to assure accurate and uniformly computed disclosures of the critical elements of credit cost.[4] These included, in particular, the total dollar cost of credit (the "finance charge") and the annualized simple interest rate of that finance charge (the "annual percentage rate"). To this day, these two items are the core of the Truth in Lending (TIL) disclosure rules for both open-end and closed-end credit. But, in the process, Congress added required disclosures of numerous other terms of the credit transaction, terms that do not necessarily or directly affect its cost, such as default charges and security interests. These additional items have prevented TIL from being the simple "price tag" law its sponsors originally envisioned. In recent years, the TIL Act has strayed even further from simplicity. Either statutory or regulatory changes have added extremely detailed disclosures for home equity plans and variable rate mortgages secured by the consumer's principal dwelling; early disclosures for credit and charge card applications and solicitations and for residential mortgage transactions subject to the Real Estate Settlement Procedures Act; and new categories of disclosures for reverse mortgage loans and high rate/high fee mortgages. Congress has evinced some concern about this, however. In the Economic Growth and Regulatory Paperwork Reduction Act of 1996, which President Clinton signed into law in 1997, the Federal Reserve Board (Board) is authorized to provide exemptions for certain types of credit transactions other than those listed in section 1602(a)(a) when, "in the determination of the Board, coverage under all or part of this subchapter does not provide a meaningful benefit to consumers in the form of useful information or protection." Moreover, the Board allows creditors to make certain disclosures in electronic form if the consumer agrees to receive the disclosures electronically.[5]

On the whole, disclosures are limited to information provided at the inception of a transaction or plan; revised disclosures due to subsequent events are not required, although there certainly are major exceptions to this generalization—refinancings in closed-end credit and periodic statements in open-end credit, for example.

From the beginning, the TIL disclosure rules have been organized to distinguish between *open-end* credit plans (typified by revolving charge accounts and credit cards) and *closed-end* credit transactions (generally fixed-term obligations

4. Congress stated the purposes of the TIL Act very broadly in § 102 (15 U.S.C. § 1601):

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

5. 64 Fed. Reg. 49,722-01 (Sept. 14, 1999).

such as retail installment sales). Required open-end disclosures include a description of the credit features of the plan at the time it is established, plus periodic statements that describe transactions and charges during succeeding billing periods. In Pub. L. No. 109-8, §§1301, 1302, 1303, 1304, 1305, 1306, 119 Stat. 204, 208, 209, 211, 212 (2005), Congress made significant amendments to the required disclosures for open-end periodic statements to caution consumers about the cost of making only minimum payments and paying late,[6]

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6. Effective the later of 18 months after April 20, 2005, or 12 months after the publication of final regulations by the Board of Governors of the Federal Reserve System, 15 U.S.C. § 1637(b)(11) was enacted to read as follows:

> (11)(A) In the case of an open end credit plan that requires a minimum monthly payment of not more than 4 percent of the balance on which finance charges are accruing, the following statement, located on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 2% minimum monthly payment on a balance of $1,000 at an interest rate of 17% would take 88 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum payments, call this toll-free number: __________." (the blank space to be filled in by the creditor).
>
> (B) In the case of an open end credit plan that requires a minimum monthly payment of more than 4 percent of the balance on which finance charges are accruing, the following statement, in a prominent location on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. Making a typical 5% minimum monthly payment on a balance of $300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call this toll-free number: __________." (the blank space to be filled in by the creditor).
>
> (C) Notwithstanding subparagraphs (A) and (B), in the case of a creditor with respect to which compliance with this title is enforced by the Federal Trade Commission, the following statement, in a prominent location on the front of the billing statement, disclosed clearly and conspicuously: "Minimum Payment Warning: Making only the required minimum payment will increase the interest you pay and the time it takes to repay your balance. For example, making only the typical 5% minimum monthly payment on a balance of $300 at an interest rate of 17% would take 24 months to repay the balance in full. For an estimate of the time it would take to repay your balance, making only minimum monthly payments, call the Federal Trade Commission at this toll-free number: __________." (the blank space to be filled in by the creditor). A creditor who is subject to this subparagraph shall not be subject to subparagraph (A) or (B).
>
> (D) Notwithstanding subparagraph (A), (B), or (C), in complying with any such subparagraph, a creditor may substitute an example based on an interest rate that is greater than 17 percent. Any creditor that is subject to subparagraph (B) may elect to provide the disclosure required under subparagraph (A) in lieu of the disclosure required under subparagraph (B).
>
> (E) The Board shall, by rule, periodically recalculate, as necessary, the interest rate and repayment period under subparagraphs (A), (B), and (C).
>
> (F)(i) The toll-free telephone number disclosed by a creditor or the Federal Trade Commission under subparagraph (A), (B), or (G), as appropriate, may be a toll-free telephone number established and maintained by the creditor or the Federal Trade Commission, as appropriate, or may be a toll-free telephone number established and maintained by a third party for use by the creditor or multiple creditors or the Federal Trade Commission, as appropriate. The toll-free telephone number may connect consumers to an automated device through which consumers may obtain information described in subparagraph (A), (B), or (C), by inputting information using a touch-tone telephone or similar device, if consumers whose telephones are not equipped to use such automated device are provided the opportunity to be connected to an individual from whom the information described in subparagraph (A), (B), or (C), as applicable, may be obtained. A person that receives a request for information described in subparagraph (A), (B), or (C) from an obligor through the toll-free telephone number disclosed under subparagraph (A), (B), or (C), as applicable, shall disclose in response to such request only the information set forth in the table promulgated by the Board under subparagraph (H)(i).
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> > (ii)(I) The Board shall establish and maintain for a period not to exceed 24 months following the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, a toll-free telephone number, or provide a toll-free telephone number established and maintained by a

for credit and charge card applications and solicitations concerning introductory or temporary rates and Internet-based solicitations,[7] and for open-end

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third party, for use by creditors that are depository institutions (as defined in section 1813 of Title 12), including a Federal credit union or State credit union (as defined in section 1752 of Title 12), with total assets not exceeding $250,000,000. The toll-free telephone number may connect consumers to an automated device through which consumers may obtain information described in subparagraph (A) or (B), as applicable, by inputting information using a touch-tone telephone or similar device, if consumers whose telephones are not equipped to use such automated device are provided the opportunity to be connected to an individual from whom the information described in subparagraph (A) or (B), as applicable, may be obtained. A person that receives a request for information described in subparagraph (A) or (B) from an obligor through the toll-free telephone number disclosed under subparagraph (A) or (B), as applicable, shall disclose in response to such request only the information set forth in the table promulgated by the Board under subparagraph (H)(i). The dollar amount contained in this subclause shall be adjusted according to an indexing mechanism established by the Board.

(II) Not later than 6 months prior to the expiration of the 24-month period referenced in subclause (I), the Board shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the program described in subclause (I).

(G) The Federal Trade Commission shall establish and maintain a toll-free number for the purpose of providing to consumers the information required to be disclosed under subparagraph (C).

(H) The Board shall:

(i) establish a detailed table illustrating the approximate number of months that it would take to repay an outstanding balance if a consumer pays only the required minimum monthly payments and if no other advances are made, which table shall clearly present standardized information to be used to disclose the information required to be disclosed under subparagraph (A), (B), or (C), as applicable;

(ii) establish the table required under clause (i) by assuming:

(I) a significant number of different annual percentage rates;

(II) a significant number of different account balances;

(III) a significant number of different minimum payment amounts; and

(IV) that only minimum monthly payments are made and no additional extensions of credit are obtained; and

(iii) promulgate regulations that provide instructional guidance regarding the manner in which the information contained in the table established under clause (i) should be used in responding to the request of an obligor for any information required to be disclosed under subparagraph (A), (B), or (C).

(I) The disclosure requirements of this paragraph do not apply to any charge card account, the primary purpose of which is to require payment of charges in full each month.

(J) A creditor that maintains a toll-free telephone number for the purpose of providing customers with the actual number of months that it will take to repay the customer's outstanding balance is not subject to the requirements of subparagraph (A) or (B).

(K) A creditor that maintains a toll-free telephone number for the purpose of providing customers with the actual number of months that it will take to repay an outstanding balance shall include the following statement on each billing statement: "Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance. For more information, call this toll-free number: __________." (the blank space to be filled in by the creditor).

Effective the later of 12 months after April 20, 2005, or 12 months after the publication of final regulations by the Board of Governors of the Federal Reserve System, 15 U.S.C. § 1637(b)(12) is enacted to read as follows:

(12) If a late payment fee is to be imposed due to the failure of the obligor to make payment on or before a required payment due date, the following shall be stated clearly and conspicuously on the billing statement:

(A) The date on which that payment is due or, if different, the earliest date on which a late payment fee may be charged.

(B) The amount of late payment fee to be imposed if payment is made after such date.

7. Effective the later of 12 months after April 20, 2005, or 12 months after the publication of final regulations by the Board of Governors of the Federal Reserve System, 15 U.S.C. 1637(c)(6) is enacted to read as follows:

(6) Additional notice concerning "introductory rates"—

(A) In general

consumer credit plans secured by a consumer's principal dwelling; adding tax advice to the initial disclosures and to the advertising rules for such

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Except as provided in subparagraph (B), an application or solicitation to open a credit card account and all promotional materials accompanying such application or solicitation for which a disclosure is required under paragraph (1), and that offers a temporary annual percentage rate of interest, shall—

(i) use the term "introductory" in immediate proximity to each listing of the temporary annual percentage rate applicable to such account, which term shall appear clearly and conspicuously;

(ii) if the annual percentage rate of interest that will apply after the end of the temporary rate period will be a fixed rate, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing of the temporary annual percentage rate in the tabular format described in section 1632(c) of this title), the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period; and

(iii) if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing in the tabular format prescribed by section 1632(c) of this title), the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation.

(B) Exception

Clauses (ii) and (iii) of subparagraph (A) do not apply with respect to any listing of a temporary annual percentage rate on an envelope or other enclosure in which an application or solicitation to open a credit card account is mailed.

(C) Conditions for introductory rates

An application or solicitation to open a credit card account for which a disclosure is required under paragraph (1), and that offers a temporary annual percentage rate of interest shall, if that rate of interest is revocable under any circumstance or upon any event, clearly and conspicuously disclose, in a prominent manner on or with such application or solicitation—

(i) a general description of the circumstances that may result in the revocation of the temporary annual percentage rate; and

(ii) if the annual percentage rate that will apply upon the revocation of the temporary annual percentage rate—

(I) will be a fixed rate, the annual percentage rate that will apply upon the revocation of the temporary annual percentage rate; or

(II) will vary in accordance with an index, the rate that will apply after the temporary rate, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation.

(D) Definitions

In this paragraph—

(i) the terms "temporary annual percentage rate of interest" and "temporary annual percentage rate" mean any rate of interest applicable to a credit card account for an introductory period of less than 1 year, if that rate is less than an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation; and

(ii) the term "introductory period" means the maximum time period for which the temporary annual percentage rate may be applicable.

(E) Relation to other disclosure requirements

Nothing in this paragraph may be construed to supersede subsection (a) of section 1632 of this title, or any disclosure required by paragraph (1) or any other provision of this subsection.

Effective until the later of 12 months after April 20, 2005, or 12 months after the publication of final regulations by the Board of Governors of the Federal Reserve System, 15 U.S.C. § 1637(c)(7) is enacted to read as follows:

(7) Internet-based solicitations

(A) In general

In any solicitation to open a credit card account for any person under an open end consumer credit plan using the Internet or other interactive computer service, the person making the solicitation shall clearly and conspicuously disclose—

(i) the information described in subparagraphs (A) and (B) of paragraph (1); and

(ii) the information described in paragraph (6).

(B) Form of disclosure

plans.[8] Congress also added a substantive prohibition on certain actions for failure to incur finance charges.[9] Closed-end disclosures, by contrast, are generally given only at the outset of the transaction, and project total credit charges over the life of the obligation. In Pub. L. No. 109-8 §1302, 119 Stat. 208, 209 (2005), Congress added tax advice to require closed-end disclosures in several

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The disclosures required by subparagraph (A) shall be—

(i) readily accessible to consumers in close proximity to the solicitation to open a credit card account; and

(ii) updated regularly to reflect the current policies, terms, and fee amounts applicable to the credit card account.

(C) Definitions

For purposes of this paragraph—

(i) the term ''Internet'' means the international computer network of both Federal and non-Federal interoperable packet switched data networks; and

(ii) the term ''interactive computer service'' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

8. Except as otherwise provided, effective 180 days after April 20, 2005, and inapplicable with respect to cases commenced under Title 11 before the effective date, subsection 15 U.S.C. § 1637a(a)(13) of this section is amended to read as follows:

(13) Tax deductibility

A statement that—

(A) the consumer should consult a tax advisor regarding the deductibility of interest and charges under the plan; and

(B) in any case in which the extension of credit exceeds the fair market value (as defined under the Internal Revenue Code of 1986) of the dwelling, the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes.

Effective 180 days after April 20, 2005, and inapplicable with respect to cases commenced under Title 11 before the effective date, 15 U.S.C. § 1665b(b) is amended to read as follows:

(b) Tax deductibility

(1) In general

If any advertisement described in subsection (a) of this section contains a statement that any interest expense incurred with respect to the plan is or may be tax deductible, the advertisement shall not be misleading with respect to such deductibility.

(2) Credit in excess of fair market value

Each advertisement described in subsection (a) that relates to an extension of credit that may exceed the fair market value of the dwelling, and which advertisement is disseminated in paper form to the public or through the Internet, as opposed to by radio or television, shall include a clear and conspicuous statement that—

(A) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(B) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

9. Effective the later of 12 months after April 20, 2005, or 12 months after the publication of final regulations by the Board of Governors of the Federal Reserve System, 15 U.S.C. 1637(h) is enacted to read as follows:

(h) Prohibition on certain actions for failure to incur finance charges

A creditor of an account under an open end consumer credit plan may not terminate an account prior to its expiration date solely because the consumer has not incurred finance charges on the account. Nothing in this subsection shall prohibit a creditor from terminating an account for inactivity in 3 or more consecutive months.

contexts.[10] In combination these disclosure rules are lengthy and intricate, and were accompanied (in the original Regulation Z) by numerous additional specifications about format, timing, and even type size.

In addition, as of May 15, 2005, there was further pending legislative action on U.S.C. §§ 1610 (Effect on other laws: the proposal would broadly preempt state regulation of high cost mortgage lending); 1632 (Form of disclosure; additional information: the proposal would mandate so-called "plain English," and require further disclosure in relation to applications and solicitations); 1637-41 (Disclosure in open and closed end consumer credit generally and in certain mortgages, and revision of civil liability for violations: the proposal would mandate numerous new disclosures about credit scores and other information, and impose various substantive limitations including regulating credit cards to students, payday loans, and high cost mortgages, among other matters); and 1646 (Dissemination of APR and other information).

Enactment of any substantial part of this proposed legislation would significantly preempt state laws and radically move toward a national, federal consumer protection code. Whether this makes sense given the failure of the states to act in a reasonably coherent manner, or represents the stifling of innovation and the erosion of serious consumer protection remains to be seen and certainly is a matter on which views may differ.

The marketplace, and ingenious litigants, soon demonstrated an immense capacity to argue over whether a particular matter should be disclosed this way or that, in one figure or through subtotals, with or without explanatory qualifications, and so on.[11] The process of refining the disclosure rules entailed much

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10. Except as otherwise provided, effective 180 days after April 20, 2005, and inapplicable with respect to cases commenced under Title 11 before the effective date, 15 U.S.C. § 1638(a)(15) is enacted to read as follows:

> (15) In the case of a consumer credit transaction that is secured by the principal dwelling of the consumer, in which the extension of credit may exceed the fair market value of the dwelling, a clear and conspicuous statement that—
>
> > (A) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and
> >
> > (B) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

Except as otherwise provided, effective 180 days after April 20, 2005, and inapplicable with respect to cases commenced under Title 11 before the effective date, 15 U.S.C. § 1638(b) is amended by adding the following at the end:

> (3) In the case of a credit transaction described in paragraph (15) of subsection (a) of this section, disclosures required by that paragraph shall be made to the consumer at the time of application for such extension of credit.

11. For example, one case involved the issue of whether, in an open-end credit disclosure, the creditor could maintain an undisclosed policy of not imposing finance charges on the customer's unpaid credit card balances for a fixed period beyond the time stated in an otherwise properly disclosed grace period. Price v. FCC National Bank, 4 F.3d 472 (7th Cir. 1993). Talk about "information overload"; one wonders what Mr. Price's *real* objective was. For a similar case where a court found an undisclosed policy of discretionary waivers of annual fees was not a TIL violation, *see* Litwin v. American Express Co., 838 F. Supp. 855 (S.D. N.Y. 1993). Another example is Stein v. JP Morgan Chase Bank, 279 F. Supp. 2d 286 (S.D.N.Y. 2003), which involved an open end variable rate credit account applied for on August 29, approved on October 25, activated on October 30 when Stein received a book of credit checks, and first drawn on November 7. The first billing

litigation, a lengthy stream of administrative agency interpretations, and a corresponding increase in the number of issues to be argued. There was also concern that TIL required more disclosure than consumers could absorb or use. In the 1980 Simplification Act, Congress sought to reduce that turmoil by streamlining both the disclosure format and its content. Some of that simplification has been lost in further developments and amendments in more recent

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statement reflected an APR of 5.250%, the agreement called for a rate at Prime minus 1.250% for 6 months and then Prime plus .750% thereafter determined on the first day of each calendar month, and Prime on November 7 was at 5%. The disclosure stated the initial rate applicable on the date the credit account was opened was 5.250%. Stein was charged a rate of 5.250% for the first billing period, and for the second period an adjusted rate of 3.75%. Stein asserted the interest rate should have been determined as of the date of advances on the account. The court held the disclosure was adequate as it clearly provided finance charges, not interest rates, began to accrue on the day an advance was charged to the account and set interest rates as of the date the credit account was opened. Moreover, since the TIL Act requires a balance between complete disclosure and information overload, the defendant's alleged failure to disclose that the credit account was deemed opened as of the application date, did not constitute a TIL Act violation. *See also* Carmichael v. The Payment Center, Inc., 336 F.3d 636 (7th Cir. 2003) (Regulation Z requires disclosure of the amounts of payments scheduled to repay; disclosure that the last payment is the balance of unpaid principal and interest to be paid in full is adequate as a complete reading of the regulation illustrates that "amount" does not necessarily equate to "dollar figure"). This interpretation is rejected as inconsistent with the clear and conspicuous requirement under revised Regulation Z at 69 Fed. Reg. 16,769 (2004).

Perhaps an ultimate example of this type of litigation is Guinn v. Hoskins Chevrolet, 836 N.E.2d 681 (Ill. App. Ct. 2005), where one point the consumer argued was that the late charges were not properly disclosed because the creditor failed to define the term "installment," and thus the disclosure was not "clearly and conspicuously" made. Then, again, perhaps the award should go to the consumer argument in Mize v. Joe's Auto Sales, Inc., 2005 WL 280343 (S.D. Ind. 2005), where it was asserted that the descriptive explanation for the total of payments disclosure that read "the amount you will have to pay after you have made all payments" instead of "the amount you will have paid" was a violation; the court concluded that no reasonable consumer would be misled.

Another example involves open versus closed-end credit. Typically, it is not difficult to distinguish between open-end credit plans and closed-end credit plans. However, in a recent decision by the Seventh Circuit, the court found that a credit arrangement financing a big-ticket item and leaving little remaining credit for future purchases was in fact an open-end transaction. The court found that the bank had a reasonable expectation of some additional transactions (there was only $200 remaining on the credit limit after the purchase). Although the court appeared to be reluctant when reaching this decision in light of the concern regarding "spurious" open-end credit, it stated that it was up to the agency to "plug the loopholes." Benion v. Bank One, 144 F.3d 1056 (7th Cir. 1998). In the final 1998 annual Staff Commentary, the Board acknowledged the difficulties with establishing a rule to differentiate between open-end credit and disguised closed-end credit. In Comment 2(a)(20)-3, the Board stated that creditors should look at whether they "reasonably contemplate repeated transactions." However, after reviewing many public comments on this proposed analysis, the Board expanded the comment to clarify that "[t]he determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis." 63 Fed. Reg. 16,669 (1998). On this point, *see In re* Merriam 333 B.R. 22 (Bankr. W.D.N.Y. 2005). The Merriams obtained a line of credit secured by a mortgage on their home in an attempt to stave off bankruptcy. The attempt was unsuccessful and when the line of credit was depleted, bankruptcy followed. The issue was whether the line of credit mortgage was subject to HOEPA, which exempts a transaction under an open-end credit plan. The court found that since the Merriams had no realistic ability to make any payments of principal and the lender had sufficient information to reach this conclusion because the entire credit line had been disbursed at closing with no possible contemplation of repeat transactions, the loan could not qualify as an open-end credit plan exempt from HOEPA.

According to Commentary ¶2(a)(20)–3, a critical consideration that is relevant to the determination of whether open-end credit is involved is information that much of a creditor's customer base with accounts under the plan make repeated transactions over some period of time, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. Thus even if one category of the customer base might not make many repeated transactions, if another category does, the overall base may allow qualification. Another issue is how much of the base? Comparison with generally recognized open-end plans of a similar type may provide some guidance.

years. Most of the analysis in this book focuses on the revised form of these disclosure rules.

In 1976, Congress enacted the Consumer Leasing Act,[12] which calls for certain disclosures in leases of personal property to consumers. Although the substance of a leasing transaction is significantly different than that of a credit transaction, it was perhaps inevitable that a "truth in leasing" act would be incorporated as part of the TIL Act. Thus, Congress added the Consumer Leasing Act as a new Chapter 5 to the TIL Act. Thus TIL technically includes lease disclosure provisions. Because of their unique character, those rules are beyond the scope of this book.[13]

[2] Rescission

During the 1960s a number of states had adopted laws calling for a "cooling-off period" or a "right to cancel" certain kinds of consumer contracts, typically those involving door-to-door selling.[14] These transactions were thought to be especially prone to fraud or predatory practices. This novel cooling-off mechanism—permitting a consumer to withdraw unilaterally from a contractual relationship—also found its way into the TIL law. The details of this background, and the current rescission rules, are discussed *infra* in chapter 8.

The inclusion of rescission provisions in the TIL Act was a legislative coincidence. At the last stages of congressional consideration of the TIL disclosure bills, the House of Representatives expressed concern about certain second mortgage practices, often arising in home-improvement transactions, in which consumers were unwittingly induced to encumber their homes to satisfy credit obligations. Therefore, Congress added a mandatory disclosure about security interests and a rescission right for transactions involving non-purchase-money mortgages on consumer dwellings. The thrust of the provision is that in those transactions consumers will be given the basic TIL cost disclosures and special disclosures about the right to rescind. The consumer is then free, within three

12. Consumer Leasing Act of 1976, Pub. L. 94-240, 15 U.S.C. § 1667 (1976). The TIL disclosure rules have always been applicable to a form of lease that is in substance a secured credit sale. *See* primary text at ¶2.05[2].

13. In mid-1983 Congress was actively considering legislation to "simplify" the Consumer Leasing Act and to remove it from the TIL Act altogether. S. 1152, the "Consumer Lease and Rental-Purchase Agreement Act," was introduced by Senator Hawkins on April 27, 1983. The text of the bill and the introductory statement appear in 129 Cong. Rec. S5402 (daily ed. Apr. 27, 1983). The U.S. Senate passed a version of this bill as part of an omnibus banking bill at the end of the 98th Congress. Title V, S. 2851, 98th Cong., 2d Sess. (1984). No action, however, was taken on the leasing provisions in the House of Representatives before the Congress adjourned.

Similarly, bills to amend the Consumer Leasing Act were introduced in the 99th and 100th Congresses, but no action was taken on any of them.

These legislative efforts, at least as they would cover rent-to-own lease contracts, soon shifted to the state level. Beginning with Michigan in 1985, all but a handful of states have now enacted rent-to-own laws.

14. *Cf.* Sher, *The Cooling Off Period in Door-to-Door Sales,* 15 U.C.L.A. L. Rev. 717 (1968).

business days, to cancel the already consummated transaction, for any reason and at no cost. The problems arise when the disclosures are not accurate, which extends the rescission period. Until the law was amended, the rescission right might have continued indefinitely. An amendment added an outer limit of roughly three years. The Supreme Court in *Beach v. Ocwen Federal Bank,* 118 S. Ct. 1408 (1998) held that homeowners must assert their right to rescind their mortgage under the TILA within three years of the loan closing to avoid forfeiting that right. In essence, this decision prohibits rescission as a defense in recoupment beyond the three years, at least under federal law. However, *In re Fidler,* 226 B.R. 734 (Bankr. D. Mass. 1998), allowed rescission as a basis for recoupment under state law, subsequent to the three year TIL limitation period. *See also Meyer v. Ameriquest Mortgage Company,* 342 F.3d 899 (9th Cir. 2003) (loan closed on March 1, 1999, rescission demanded due to asserted inaccurate disclosure on May 22, 2000, home sold in December 2000 and loan paid off; once the home was sold and the loan paid off, the rescission provision no longer applied under amended 15 U.S.C. section 1635(f)). *See also Marschner v. RJR Financial Services, Inc.*, 382 F. Supp. 2d 918 (E.D. Mich. 2005), where the mortgage was foreclosed and three days prior to the expiration of the consumer's statutory redemption period the consumer asserted rescission, arguing that the sale pursuant to foreclosure did not end his right to rescind because it was not complete until the redemption period was over. The court held that rescission was too late, as after the foreclosure sale and sheriff's deed the mortgagor had only the right to redeem, which was not a property right under Michigan law, and thus the mortgagor had no ownership interest in the property on which to base rescission. *See also R.G. Financial Corp v. Vergara-Nunez,* 446 F.3d 178 (1st Cir. 2006), where the earlier foreclosure judgment precluded the mortgagor's later assertion of the right of rescission under the TILA.

A somewhat similar analysis was made in *King v. State of California,* 784 F.2d 910 (9th Cir. 1986) (recission too late after refinancing and release of the mortgage). However, the 6th Circuit disagrees. *See Barrett v. JP Morgan Chase Bank, N.A.,* 445 F.3d 874 (6th Cir. 2006). In addition, the 7th Circuit disagrees. *See Handy v. Anchor Mortg. Corp.,* 464 F.3d 760 (7th Cir. 2006) (remedies associated with rescission remain available even after the subject loan has been paid off).

The extent of the rescission period, unfortunately, was not the only problem in this hastily drawn legislation. Other issues that have arisen, for example, have been over: (1) whether notice of rescission rendered the agreement void ab initio, so as to preclude enforcement of an otherwise applicable arbitration provision in the agreement (*see Bertram v. Beneficial Consumer Discount Co.,* 286 F. Supp. 2d 453 (M.D. Pa. 2003) (a notice of rescission under TIL Act is not effective to preclude enforcement of an arbitration agreement in a consumer credit contract)); this result would seem to be confirmed by the holding of the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct 1204 (2006) (arbitration clause in a consumer loan contract under the Federal Ar-

bitration Act [and under many state laws] must be given full force and effect in spite of state law that may render the contract void or voidable). *But see Chapman v. Mortgage One Corp.*, 359 F. Supp. 2d 831 (E.D. Mo. 2005) (where the contract was rescinded, the terms, including an arbitration clause, became void). (2) what is necessary to trigger the right of rescission (*see, e.g., Grimes v. New Century Mortg. Corp.,* 340 F.3d 1007 (9th Cir. 2003) (a borrower has a right to rescind until midnight of the third business day following consummation of the transaction; consummation occurs when the borrower is contractually obligated; the point at which a contractual obligation is created is a matter of state law; remanding case for determination of whether a contract was formed amid issues of offer and acceptance, conditions, consideration, misrepresentation, etc.); *see also Bank of New York v. Conway*, 50 Conn. Supp. 189, 916 A.2d 130 (Conn. Super. 2006) (for purposes of deadline for rescission of consumer loan under TIL Act, loan was consummated when mortgagors signed promissory note, not when one mortgagor later signed mortgage deed, and thus period in which to rescind ended three days after note was signed; mortgage deed only created security interest acquired for purposes of credit transaction); and *see also O'Brien v. Aames Funding Corp.*, 374 F. Supp. 2d 764 (D. Minn. 2005) (a loan may be "consummated" despite other conditions related to the loan); (3) whether the traditional concept of rescission (return to status quo) is applicable under the TIL Act (*see, e.g., Wilson v. Homeowners Loan Corp.*, 263 F. Supp. 2d 1212 (E.D. Mo. 2003) (although the TIL Act generally provides that the creditor must perform first (*i.e.*, give back any of the borrower's money and release the security interest before the borrower has to give back the lender's money), the amended act gives courts discretion to devise other procedures, including conditioning rescission upon the debtor's prior return of the loan principal). *See also Quenzer v. Advanta Mortgage Corp. USA,* 288 B.R. 884 (D. Kan. 2003) (same); *In re Williams,* 291 B.R. 636 (Bankr. E.D. Pa. 2003) (lender's failure to return any down payment or earnest money and to reflect termination of its lien did not relieve borrower of obligation to tender amount of loan in circumstances involved). Other cases addressing this issue include *In re Merriman*, 329 B.R. 710 (D. Kan. 2005); *In re Ramirez*, 329 B.R. 727 (D. Kan. 2005); *In re Robertson*, 333 B.R. 894 (Bankr. M.D. Fla. 2005); and *Egipciaco Ruiz v. R&G Financial Corporation*, 383 F. Supp. 2d 318 (D. P.R. 2005). Revised Official Staff Commentary at 69 Fed. Reg. 16769 (2004) (revising staff commentary to § 226.15 and § 226.23) provides further guidance on consumers' exercise of the right to rescind certain home-secured loans; and (4) a host of other issues, including: (a) what must be returned to the consumer upon rescission (*compare Jones v. E*Trade Mortgage Corporation*, 397 F.3d 810 (9th Cir. 2005) (rate lock fee) *with General Home Capital Corp. v. Campbell*, 800 N.Y.S.2d 917 (N.Y. Dist. Ct. 2005) (rejecting consumer's claim for return of application and appraisal fees); *see also Barrett v. JP Morgan Chase Bank, N. A., supra;* (b) what part and what kind of a transaction is subject to rescission (*see Associates First Capital Corp. v. Booze*, 912 So.2d 696 (Fla. App. 2005) (only to extent new amount financed exceeded unpaid principal balance of prior loan, any earned

unpaid finance charge, and costs of refinancing) and *Milligan v. Sentry Exteriors, Inc.*, 2005 WL 1229791 (D. N.J. 2005) (mere ability to obtain a mechanics lien did not make contracts consumer credit obligations)); and (c) whether a class action is an appropriate remedy in actions for rescission (*compare Murry v. America's Mortgage Banc, Inc.*, 2005 WL 1323364 (N.D. Ill. 2005) (rescission is a personal remedy) and *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007) (the First Circuit followed the Fifth Circuit (see *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980)) and held that Congress did not intend rescission suits to receive class-action treatment) *with Rodrigues v. Members Mortgage Co., Inc.*, 226 F.R.D. 147 (D. Mass. 2005) (class action resolution is appropriate)).

The rescission right was as close as Congress came in the original TIL Act to regulating the substantive content of consumer credit contracts. Of course, as discussed earlier, later amendments have not demonstrated that same reluctance. But even the rescission mechanism does not dictate contract terms (such as price, rate, remedies, and the like)—rather it imposes a delay between the striking of a deal and the commencement of performance. The TIL Act, in this regard, aims at a particular kind of consumer fraud, and seeks to protect a particular type of consumer asset by adjusting the normal mutuality rule for contract formation.

[3] Special Credit Card Rules

The early years of TIL corresponded to a period of very rapid growth in open-end credit, especially pursuant to credit cards issued by merchants, banks, and other financial institutions. This form of credit was relatively new in 1969 (when TIL took effect), as opposed to closed-end credit, which was the traditional mode of consumer financing. Many basic ground rules for closed-end credit already had evolved through state legislation and case law;[15] but there were few existing precedents for the regulation of credit dispensed through a plastic card.

The TIL Act therefore became the vehicle for imposing a number of substantive restrictions on the operation of credit card and similar open-end plans,[16] and later amendments have expanded the coverage. These rules, discussed *infra* in chapters 9 and 10, include the following:

- Mandatory procedures for the resolution of billing disputes;
- Prohibition of unsolicited issuance of credit cards;

15. *Cf.* B. Curran, Trends in Consumer Credit Legislation (1965).

16. Congress amended the statement of purpose for the TIL Act to include the following as a goal: "to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a), as *amended* by Pub. L. 93-495, § 302 (1974). *See supra* note 4.

- Restrictions on the cardholder's liability for unauthorized use of the credit card (*in Thomas D. Mangelsen, Inc. v. Heartland Payment Systems, Inc.*, 2005 WL 2076421 (D. Neb. 2005)), a merchant argued that the protection of section 1643 with regard to unauthorized use should protect him against a wrongful charge-back by the bank; the court held that section 1643 does not recognize merchants' rights against card issuers or cardholders);
- Prohibition of creditor offsets against deposit accounts of the cardholder;
- Limitations on the ability of card issuers to be insulated from cardholder claims and defenses;
- Establishment of the right of a merchant to offer discounts to cash customers;
- A series of rules on the handling of payments, returns, and credit balances; and
- Special disclosure rules concerning changes in the provider of insurance for repayment, renewals, and applications and solicitations.[17]

What the majority of these provisions have in common is that they are *not* strictly disclosure matters, but rather create statutory rights for credit card and open-end credit consumers. Although there were occasional state law antecedents for some of these rules, and some state copycat law, in general the TIL Act dominates the landscape for these rights. In the disclosure area, by contrast, many state law disclosure rules are piggybacked on the federal disclosures.

[4] Advertising

The fundamental concern of Congress in developing a truth in lending law was to eliminate deceptive and misleading representations about credit costs so consumers could credit shop and avoid uninformed use of credit. This goal involves not only content, but timing. Disclosures controlled as to content and given to individual consumers in individual transactions at or shortly before consummation are the primary mechanism used. For comparison shopping, timing is the problem, however. In the real estate area, some earlier disclosures had been required in certain circumstances in closed-end transactions. Then, in 1988, Congress added two major laws in the open-end credit area. Both laws exhibit characteristics of prior legislation, but also began to mark a significant emphasis different from transactional disclosure. The Home Equity Loan Consumer Protection Act of 1988[18] adds new application-stage disclosures for home

17. *See supra* note 5 under the heading "[1] Disclosure of Credit Costs and Terms."
18. Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (1988), codified at 15 U.S.C. § 1637a.

equity lines, and brings variable rate disclosures for these loans into line with the closed-end adjustable rate mortgage disclosures.[19] It also called for a number of substantive restrictions on the terms of such programs and, by substantively controlling changes in terms and events of default, this legislation represents a further step beyond disclosure and intrudes into matters previously left to state law.

The Fair Credit and Charge Card Disclosure Act[20] is purely a disclosure law and also mandates advanced disclosure of certain terms in connection with credit and charge card solicitations and applications. But, unlike previous disclosure legislation, it purports to occupy the field to the exclusion of state laws that are not inconsistent and that may even be more protective than the new federal law.

Amendments to the Truth in Lending Act in 2005 (see the discussion under "[1] Disclosure of Credit Costs and Terms," *supra)* add to the advertising requirements for closed and open-end consumer credit plans secured by a consumer's principal dwelling disclosure concerning tax deductibility of interest and charges.

Clearly, however, the timing problem in disclosure also is addressable at the advertising stage. The TIL Act has, from the beginning, regulated the content and accuracy of advertising about credit terms. These rules are discussed in detail in chapter 11. In general, they constrain advertising practices in two ways. The TIL Act bars a person from advertising credit terms that are untrue or that are not actually available, that is, bait-and-switch misrepresentations.[21] The Act also requires that if an advertisement uses certain credit terms, then it must also contain certain additional items to assure that consumers get a reasonably complete picture of the credit offering, and that the advertising is not deceptive or misleading.

The TIL Act directs the Board to collect and publish, on a demonstration basis, annual percentage rates for representative types of credit in various metropolitan statistical areas and semi-annual reports regarding credit card price and availability.[22] Finally, the TIL Act regulates oral responses to credit cost inquiries.[23]

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19. Regulation Z §§ 226.19(b) and 226.20(c). The Board published revisions to Regulation Z § 226.19(b) at 62 Fed. Reg. 63,441 (1997), implementing the Economic Growth and Regulatory Paperwork Reduction Act of 1996. This amendment provides an alternative disclosure option for those loans that exceed one year and are secured by the consumer's principal dwelling. (12 C.F.R. § 226.19(b)(2)(viii)). The revision allows creditors to exclude the 15-year historical example of index values as long as they provide a "statement that the periodic payment may substantially increase or decrease together with a maximum interest rate and payment based on a $10,000 loan amount." The mandatory compliance date was October 1, 1998. *See generally* Kathleen E. Keest et al., *1997 Truth in Lending Developments*, 53 Bus. Law. 971, 974 (1998).

20. Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988), codified at 15 U.S.C. § 1637.

21. *But see* Clark v. Troy and Nichols, Inc., 864 F.2d 1261 (5th Cir. 1989) (responding to argument that TIL disclosures were inaccurate because the lender had no intent of making a real estate loan on the terms offered; the court held that where disclosures were accurate, intent did not make them inaccurate).

22. TIL Act § 136, 15 U.S.C. § 1646.

23. TIL Act § 146, 15 U.S.C. § 1665a.

[5] Enforcement

Add a new footnote after the second sentence of the second paragraph of the primary text.

24a. Cases on damages include: *Belini v. Washington Mutual Bank, F.A.*, 412 F.3d 17 (1st Cir. 2005) (damages for failure to respond properly to consumer's claim for rescission, involving Massachusetts, an "exempt state," noting that an exemption extends only to substantive requirements); *Dykstra v. Wayland Ford, Inc.*, 134 Fed. Appx. 911 (6th Cir. 2005) (no statutory damages for failure to provide a copy of disclosures); *Hart v. V.B. Investments, Inc.*, 2005 WL 1668540 (M.D. Fla. 2005) (no statutory damages for failure to properly disclose the itemization of the amount financed); *Warburton v. Foxtons, Inc.*, 2005 WL 1398512 (D.N.J. 2005) (no statutory damages for failure to properly disclose appearance and order of disclosures or form and timing of disclosures; for actual damages a borrower must show, concerning a timing violation, that they were prevented from obtaining better terms elsewhere and that they would have looked for and been able to obtain them); and *In re Merriman*, 329 B.R. 710 (D. Kan. 2005) (whether damages must be paid or can be set off by a creditor).

24b. Cases on attorneys' fees include: *Dykstra v. Wayland Ford, Inc.*, 134 Fed. Appx. 911 (6th Cir. 2005) (attorneys' fees and costs can be awarded only where there are actual and statutory damages); *Abel v. KeyBank USA, N.A.*, 2005 WL 2216938 (N.D. Ohio 2005) (attorneys' fees are recoverable for successful prosecution of a TIL claim but not for other claims such as a claim under a state retail installment sales act); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 384 F. Supp. 2d 915 (E.D. Va. 2005) (discussion of the effect a reduction in damage award has on the award of attorneys' fees and costs), *aff'd in part and vacated in part,* 478 F.3d 183 (4th Cir. 2007).

As to class actions, *see: Meyers v. ABN Amro Mortgage Group, Inc.*, 2005 WL 2396991 (E.D. Mich. 2005) (motion to dismiss on grounds of statute of limitations depends on the merits of the named plaintiff's claims, not on those of unnamed class members); *Porter v. NationsCredit Consumers Discount Co.*, 229 F.R.D. 497 (E.D. Pa. 2005); *Murry v. America's Mortgage Banc, Inc.*, 2005 WL 1323364 (N.D. Ill. 2005), *Rodrigues v. Members Mortgage Co., Inc.*, 226 F.R.D. 147 (D. Mass. 2005) (discussing the prerequisites for class certification), and *Andrews v. Chevy Chase Bank, FSB,* 474 F.Supp.2d 1006 (E.D. Wis. 2007).

Cases on defenses to private remedies include: The violation was a bona fide error (*see In re Boganski*, 322 B.R. 422 (9th Cir. BAP 2005)); the statute of limitations (*see, e.g., Durham v. Loan Store, Inc.*, 2005 WL 2420389 (N.D. Ill. 2005) (statute may be postponed by equitable tolling); *Hamm v. Ameriquest Mortgage Company*, 2005 WL 2405804 (N.D. Ill. 2005) and *Brown v. Nationscredit Financial Services Corporation*, 349 F. Supp. 2d 1134 (N.D. Ill. 2005) (extended three year right to rescind does not extend one year disclosure lim-

itations period); *Rohr v. Home Loans Corporation*, 2005 WL 2027684 (D. Colo. 2005) (disclosure violations were not "ongoing" so as to postpone the statute of limitations); and *Bolden v. Aames Funding Corp.*, 2005 WL 948592 (W.D. Tenn. 2005) (the statute of limitations for rescission claims is absolute and equitable tolling does not apply)).

¶ 1.02 Chronology and Legislative History

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[4] Beyond Simplification—Competing Forces

The era of simplification in TIL was short-lived. The simplification effort was clearly a step in the right direction, but soon competing forces began to demand more TIL regulation and greater complexity.

Several sources generated this need for more complex rules. First, credit products themselves became more complex. Adjustable rate mortgages grew in popularity and two new products, home equity lines of credit and reverse mortgage loans, became more widely available. In addition, the marketing of credit products, particularly direct mail solicitations of credit cards, increased in volume. The continuing failure of the states to agree on uniform regulation of consumer credit also placed greater emphasis on TIL as the primary source of consumer protection in the increasingly complex credit markets.

These various forces led Congress to impose specific new substantive requirements on certain credit products that previously were subject only to the general TIL rules. The first new requirement imposed new disclosures regarding certain aspects of credit card plans in solicitations and applications for credit cards.[73] Another concerned the adequacy of disclosures concerning home equity lines of credit.[74] Congress then jointly addressed first a perceived need for greater protection for less sophisticated consumers that are subject to higher cost mortgage loans and second a need for more pertinent disclosures for reverse mortgage loans, a category of credit that was, indeed, poorly addressed by the previous TIL rules.[75] Finally, as discussed below, Congress responded to the industry's concern regarding what it saw as unnecessary litigation over meaningless technical issues and again "simplified" the TIL rules somewhat.

In 1988 Congress passed the Fair Credit and Charge Card Disclosure Act to address the growing numbers of credit card solicitation offers.[76] The rules require disclosures of the annual percentage rate, fees, method of computing finance charges, and any grace period in prescreened solicitations and some advertisements. The legislation also imposes disclosures when the annual fee renews and limits unilateral changes in credit insurance on credit card plans.

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73. Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988).

74. The Home Equity Loan Consumer Protection Act, Pub. L. No. 100-709, 102 Stat. 4725 (1988).

75. The Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (1994).

76. *See* the discussion *infra* this text at ¶¶ 7.04[2][c] and 7.04[1][a].

At almost the same time Congress imposed new disclosures on home equity lines of credit.[77] The concern of some members of Congress and consumer groups is that these credit plans, which offer revolving loans secured by the consumer's home, are dangerous for unsophisticated consumers and should be subject to direct regulation or at least clear disclosures. The Home Equity Loan Consumer Protection Act requires early and complete disclosure of key loan conditions at the time of the loan application, and imposes significant restraints on the creditor's ability to declare a default or to amend the terms of the plan. The substantive prohibitions and limitations in this legislation far exceed the few other non-disclosure requirements that had previously been incorporated in the TIL Act.

In 1994 Congress addressed two specific mortgage products in the Home Ownership and Equity Protection Act (HOEPA). The first part of this act mandates new disclosure requirements and new substantive restrictions, including a pre-consummation cooling-off period for certain high fee/high rate mortgage loans.[78] Congress also directed a Board study and continued hearings related to home equity lending and the adequacy of existing regulatory and legislative provisions to protect the interests of consumers. The act also imposes special disclosures for reverse mortgage loans, which are transactions in which an equity interest in the home is surrendered in exchange for either a single lump-sum payment or a series of periodic payments, the latter are often funded through the purchase of an annuity for the benefit of the consumer.[79] Creditors offering reverse mortgage loans must provide new pre-consummation disclosures of the projected total cost of credit based on various assumptions, a summary of loan terms and charges, and a statement that the consumer is not obligated to complete the transaction merely because the consumer has received the loan disclosures.

HOEPA was the first enactment of TIL law to adopt consumer protections aimed primarily at protecting specific portions of the population rather than the general public at large. The high fee/high rate mortgage rules were deemed necessary because these types of loans are often aimed at the poor and unsophisticated consumer who is not eligible, or may not have the perception that he or she is eligible, for more conventional mortgage products. Consumer advocates also claim that these loans unfairly target minority populations. The reverse mortgage loan product was designed principally for the elderly consumer that may be "land poor" and wishes to draw upon the equity in the home for living or medical expenses. Consumer advocates urged the adoption of the reverse mortgage disclosures to better inform this class of consumer about the terms of a necessarily complex consumer credit transaction.

77. This law is discussed *infra* this text at ¶¶ 6.07 and 7.04.
78. This aspect of the law is found at 15 U.S.C. §§ 1602(aa)(1) and 1639 (1994).
79. This aspect of the law is found at 15 U.S.C. § 1648 (1994).

Liability concerns somewhat similar to those in part responsible for enactment of TIL simplification arose out of the litigation over disclosure of the finance charge amount in the case of *AIB Mortgage Co. v. Rodash*.[80] Congress responded with the Truth in Lending Act Amendments of 1995 (TIL Act Amendments),[81] which was preceded by a class action moratorium until October 1, 1995.[82] The TIL Act Amendments made significant revisions to the rules for determining the finance charge, disclosure tolerances, civil liability, and the right of rescission in closed-end transactions.

In the midst of these more substantive actions, Congress also gave its attention to two relatively minor issues. In 1987, Congress enacted legislation[83] that requires any adjustable rate mortgage to include a limitation on the maximum interest rate that may apply during the term of the credit. While not technically an amendment to the TIL Act, it was "plugged into" the TIL Act for enforcement purposes, and the Board amended Regulation Z to accommodate the new rule.[84] A more bizarre result occurred with the enactment of section 933 of the Housing and Community Development Act of 1992,[85] which prohibits the use of the Rule of 78[86] in consumer credit transactions with terms of more than 61 months. Section 933 incorporates definitions found in the TIL Act, but unlike the maximum interest rate legislation, Congress failed to give the Board jurisdiction over this statute. Nevertheless, the provision was codified in the middle of the TIL Act.[87] However, the enactment is not addressed in Regulation Z and is not found in the consumer credit laws published by the Board. As a final twist to this saga, the high fee/high rate mortgage provisions of the Homeownership and Equity Protection Act twice cite to definitions contained in section 933.[88] Thus, while this provision is not truly a part of TIL it is inexorably intertwined with TIL.

In 2005, Congress, again in response to new developments in the consumer credit market, once more added yet additional disclosures in both open and closed end credit and in relation to advertising to caution about the cost of making only minimum payments or late payments, to flag the nature of introductory or temporary rates, and to furnish rudimentary tax advice. Congress

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80. 16 F.3d 1142 (11th Cir. 1994). *Rodash* involved disclosure which left out of the finance charge express delivery charges incurred in paying off a prior mortgage, and a state tax on loans secured by real property imposed on the creditor but paid by the consumer. These omissions were determined to be disclosure violations, were very widespread, and the resulting class actions were believed a serious solvency threat to mortgage lenders.

81. Pub. L. No. 104-29, 109 Stat. 271 (1995) (the TIL Act Amendments).

82. Pub. L. No. 104-12 (May 18, 1995).

83. 12 U.S.C. § 3806 (Pub. L. No. 100-86, Tit. XII, § 1204, Aug. 10, 1987).

84. Regulation Z § 226.30, discussed *infra* this text at ¶ 6.05[5].

85. Pub. L. No. 102-550, 106 Stat. 3891 (1992), codified as 15 U.S.C. § 1615.

86. The Rule of 78 is a method of approximating the amount of unearned interest when a precomputed loan is repaid. The method developed as a matter of convenience in the era before electronic calculators and computers became commonplace. It survives today, in large part, because the approximations produced by this rule generally favor the creditor. An excellent discussion, and explanation, of the Rule of 78 appears in *In re* McMurray, 218 B.R. 867 (Bankr. E.D.Tenn. 1998).

87. 15 U.S.C. § 1615.

88. TIL Act § 129 (c)(1)(B) and (d); 15 U.S.C. § 1639 (c)(1)(B) and (d).

also imposed a prohibition on terminating an account based on the failure of a consumer to incur finance charges. It would appear that certainty now is a trilogy: death, taxes, and continuing amendments to Truth in Lending.

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[6] Chart of Legislative History

The following chart lists, in chronological order, all the legislative enactments that comprise the TIL Act. Each entry includes the public law number, a description of the enactment, and the provisions of the U.S. Code that were affected. Pertinent congressional reports are also listed.

Table 1.1
Legislative History of the Truth in Lending Act

Description	*Citation*	*Senate/House Reports*
1968 Pub. L. No. 90-321 Consumer Credit Protection Act, Title 1, Chs. 1–3: "Truth in Lending Act"	15 U.S.C. §§ 1601–1641, 1661–1665, 82 Stat. 146	• S. Rep. No. 392 (1967) • H.R. Rep. No. 1040 (1967) • H. Conf. Rep. No. 1397 (1968)
1970 Pub. L. No. 91-508 Title V: "Provisions relating to Credit Cards," adding TIL Act §§ 132–134	15 U.S.C. §§ 1642–1644, 84 Stat. 1126	• S. Rep. No. 1139 (1970) • H. Conf. Rep. No. 1587 (1970)
1974 Pub. L. No. 93-495 Title III: "Fair Credit Billing Act," added as Ch. 4 of TIL Act Title IV: Amendments to the TIL Act	15 U.S.C. § 1666, 88 Stat. 1511 88 Stat. 1517	• S. Rep. No. 750 (1972) • S. Rep. No. 278 (1973)
1975 Pub. L. No. 94-205 § 11: amending TIL Act § 121	89 Stat. 1159	• S. Rep. No. 94-410 (1975) • H. Rep. No. 94-667 (1975) • H. Conf. Rep. No. 94-769 (1975)
1976 Pub. L. No. 94-222 § 3: amending TIL Act §§ 103, 130, 167, 171	90 Stat. 197	• S. Rep. No. 94-472 (1975)
1976 Pub. L. No. 94-240 "Consumer Leasing Act," added as Ch. 5 of TIL Act	15 U.S.C. § 1667, 90 Stat. 275	• S. Rep. No. 590 (1976) • H. Rep. No. 544 (1975) • H. Conf. Rep. No. 872 (1976) • S. Conf. Rep. No. 686 (1976)

Table 1.1 *continued*
Legislative History of the Truth in Lending Act

Description	*Citation*	*Senate/House Reports*
1978 Pub. L. No. 95-630 § 1501: extending surcharge prohibition	92 Stat. 3713	• S. Rep. No. 96-5 (1979)
1980 Pub. L. No. 96-221 Depository Institutions Deregulation and Monetary Control Act, Title VI: "Truth in Lending Simplification and Reform Act"	94 Stat. 168	• S. Rep. No. 720 (1978) • S. Rep. No. 73 (1979) • H. Conf. Rep. No. 842 (1980)
1981 Pub. L. No. 97-25 "Cash Discount Act," clarifying permissible discounts and extending surcharge prohibition	95 Stat. 144	• S. Rep. No. 23 (1981) • H. Conf. Rep. No. 159 (1981)
1981 Pub. L. No. 97-110 § 301: delaying effective date of Simplification Act	95 Stat. 1515	
1982 Pub. L. No. 97-320 §§ 701, 702: amending "creditor" definition; excluding student loans	96 Stat. 1538	• S. Rep. No. 97-536 (1982) • S. Conf. Rep. No. 97-641 (1982) • H. Rep. No. 97-550 (1982) • H. Conf. Rep. No. 97-889 (1982)
1984 Pub. L. No. 98-479 § 205: repealing sunset for open-end rescission	98 Stat. 2234	• H. Conf. Rep. No. 98-1103 (1984)
1987 Pub. L. No. 100-86 Tit. XII § 1204: rate caps in ARMs	101 Stat. 552 12 U.S.C. § 3806	• S. Rep. No. 100-19 (1987) • H. Rep. No. 100-62 (1987) • H. Conf. Rep. No. 100-261 (1987)
1988 Pub. L. No. 100-583 Fair Credit and Charge Card Disclosure Act, amending TIL Act §§ 127, 130, 111	102 Stat. 2960	• S. Rep. No. 100-259 (1987) • H. Rep. No. 100-1069 (1988)
1988 Pub. L. No. 100-709 Tit. IV—Home Equity Loan Consumer Protection Act, adding §§ 127A, 137, and 147 to TIL Act	102 Stat. 4725	• H. Rep. No. 100-822 (1988)
1992 Pub. L. No. 102-550 § 933: adding § 1615 prohibition on use of "Rule of 78" in connection with mortgage refinancings and rebates on consumer loans	106 Stat. 3891	• S. Rep. No. 102-332 (1992) • H. Rep. No. 102-760 (1992) • H. Conf. Rep. No. 102-1017 (1992)

Table 1.1 *continued*
Legislative History of the Truth in Lending Act

Description	*Citation*	*Senate/House Reports*
1994 Pub. L. No. 103-325 Home Ownership and Equity Protection Act, amending and adding to TIL Act to mandate disclosures and limit contractual terms in high rate/high fee and reverse mortgages	108 Stat. 2160	• S. Rep. No. 103-169 • H. Conf. Rep. No. 103-652
1995 Pub. L. No. 104-29 Truth in Lending Act Amendments, amending calculation of finance charge, tolerances, and liability provisions	109 Stat. 271	
2005 Pub. L. No. 109-8 Title XIII—Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amending 15 U.S.C. §§ 1637, 1637c, 1638 & 1664-65	119 Stat. 108	• H. Rep. No. 109-31 (2005) • H. Rep. No. 109-43 (2005)

¶ 1.03 Interpretive Guidance and Resource Literature

To understand and apply TIL on the basis of the statute alone is impossible. Any practitioner or other student of TIL must therefore be familiar with the backup sources of information about the TIL Act. This section describes those materials.

[1] Regulation Z

The TIL Act expressly directs the Board to implement the statutory rules by regulation.[92] This the Board has done, since 1969, in its Regulation Z.[93] That Regulation was amended a number of times between 1969 and 1981 to reflect changes in the TIL Act or the Board's own determination to expand or clarify the rules. In 1981, Regulation Z was completely rewritten to implement the Simplification Act changes and also to streamline those regulatory provisions for which no substantive change was necessary. Except for an occasional reference made in this book to "prior Regulation Z," the version of the Regulation discussed hereafter is the 1981 revision as amended from time to time since then. The most recent amendments to Regulation Z include amendments to revise the disclosure requirements for credit and charge card solicitations and applications, 65 Fed. Reg. 58,903 (2000); to establish uniform standards for the electronic delivery of disclosures, 66 Fed. Reg. 17,329 (2001), and to provide an interim final rule as to such, 66 Fed. Reg. 41,439 (2001); to implement the Home Ownership and Equity Protection Act (HOEPA), 66 Fed. Reg. 65,604 (2001); and to add an interpretive rule of construction as to the word "amount" in disclosure requirements.

Several features of Regulation Z bear special emphasis. The Regulation is intended by the Board to be a complete statement of the compliance responsibilities imposed by the TIL Act. This means that the Regulation restates all the duties imposed by the Act, and it is not necessary for one using the Regulation also to seek guidance from the statute. It should be noted, however, that Regulation Z does not restate the provisions of the TIL Act that impose sanctions for non-compliance. The rules for civil, administrative, and criminal penalties appear only in the act itself.

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92. TIL Act § 105, 15 U.S.C. § 1604.

93. 12 C.F.R. Pt. 226. The letter "Z" derives from the fact that the regulation is the 26th part of the 200-series in 12 C.F.R., and Z is the 26th letter of the alphabet.

A second reason why Regulation Z is indispensable in dealing with TIL matters is because the Regulation modifies, expands, and refines the obligations imposed by the TIL Act. This is not presumptuous action by the Board, but rather is consistent with Congress' expressed authorization that the Board should have the power to adjust the ground rules as it believes necessary or proper to achieve the purposes of the Act or to prevent circumvention or evasion of the Act's provisions. Thus Regulation Z may require disclosures not specifically mentioned in the Act, or it may require that disclosures contain more detail than the Act mentions, or it may provide options not explicit in the statute. In all operational respects, therefore, Regulation Z *is* the truth in lending law. Nonetheless because on occasion the Board has been found to have exceeded its authority, it is important to determine if that may be the case with respect to a given issue. See, e.g., *In re Stanley*, 315 B.R. 602, 615 (Bankr. D. Kan. 2004), (12 C.F.R. § 226.23(d)(4) is not a permissible interpretation of 15 U.S.C. § 1635(b) because voiding a security interest is a "step to be followed" or "action to be taken," not a consequence of voiding a security interest. Rescission "does not mean an annulment that is definitely accomplished by unilateral pronouncement, but rather a remedy that restores that status quo ante," and the voiding of the security interest is a step in the procedure outlined in TILA § 1635(b) that begins upon a creditor's receipt of the notice of rescission from a debtor).

If the TIL Act was "simplified" in the 1980 amendments, it would seem to follow that the new version of Regulation Z would be simpler than its predecessor. At first, that appeared to be true as the new Regulation was significantly shorter than the prior version. In fact, some shortening of the Regulation was attributable to changes in the Act, although some shortening of the regulatory text was also due to a more succinct writing style. But one would be unwise to conclude that the substantive content of the TIL rules has been dramatically simplified. In the real world, consumer credit transactions are becoming, if anything, more complex and the TIL law must accommodate that complexity. It does so in part by expanding the statutory requirements and a concomitant increase in the text of Regulation Z itself,[94] but in main by shunting many of the important compliance questions off to another level of interpretive material, the Board's Staff Commentary, which is discussed in the following section.

Regulation Z also includes a number of appendices containing model forms, annual percentage rate computations, and various procedural matters.

94. Most of the expansion of the regulation is in direct response to regulatory enactment. However, a major exception occurred in 1987 independent of any Congressional action. At that time the Board adopted a significant expansion of the TIL law to accommodate a uniform system of disclosing the terms of adjustable rate mortgage loans during the application process. The regulations culminated a joint effort of the Board, the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board (the predecessor of the Office of Thrift Supervision) and the Department of Housing and Urban Development to produce a single form of adjustable rate mortgage loan disclosure. An excellent summary of the adjustable rate mortgage regulations, as adopted, appears in Schmelzer & Chamness, *Truth in Lending Developments in 1988: A Year of Frenetic Activity,* 44 Bus. Law. 987 (May 1989).

[2] Federal Reserve Board Staff Interpretations

[a] Background

In the halcyon days of TIL—that is, during the 1970s—it was possible to get more or less authoritative guidance about the law from five different administrative levels. First, there was the text of Regulation Z itself. Second, there were Official Board Interpretations of the Regulation; these pronouncements by the Board numbered about 60 before the new Regulation Z displaced them. The Official Board Interpretations were printed in the Board's Regulation Z pamphlet as well as in the Code of Federal Regulations, and were the most authoritative advice from the Board on the meaning of its own regulatory language.

From 1969 onward, the Board staff generously also wrote letters responding to inquiries (mostly from creditors) about the requirements of Regulation Z. Originally, these letters were altogether "unofficial" advice in the sense that they carried no imprimatur from the Board itself, and they were never binding on courts deciding TIL cases. In 1976, the TIL Act was amended to provide that "official" *staff* interpretations could also be issued.[95] These letters, written for the most part by the same Board staff personnel who had been writing the unofficial interpretations, could, of course, be overturned by the Board itself, or by a court. But, until such a reversal, these official staff interpretations served as infallible authority for creditors by protecting against any sanction if the creditor's conduct was in conformity with them. Thus there were two distinct categories of Board staff guidance about Regulation Z: Official Staff Interpretations (styled, for example, FC-0053, to mean the fifty-third interpretation issued by the Fair Credit staff) and unofficial staff letters (commonly referred to as "public information letters"). These comprised the third and fourth levels of administrative interpretation. Together, there were more than 1,500 such letters in existence by the time Regulation Z was rewritten in 1981. These letters were published in Commerce Clearing House's Consumer Credit Guide, and formed an independent sub-body of TIL jurisprudence, which no practitioner could afford to overlook.

The fifth level of staff guidance never had any real authoritativeness, but was often the most accessible and the most practical: this was information gathered from Board staff informally, as by telephone or personal visit.

As has been noted, a major characteristic of TIL during the 1970s was the propensity of compliance issues to multiply like amoebae. The staff letters, while well-intentioned, contributed to this problem, for it could be a challenging task for counsel to find, read, synthesize, and distinguish all the staff advice. A published answer to one inquiry would often generate two more inquiries to determine if unique circumstances changed the answer. In short, the multilevel

95. Pub. L. 94-222, 90 Stat. 197 (1976), *amending* TIL Act § 130(f), 15 U.S.C. § 1640(f).

system of administrative advice became unworkable. The Board and its staff took the occasion of the rewriting of Regulation Z to reorient their advisory function.

[b] The Commentary

Contemporaneously with the issuance of the revised Regulation Z in 1981, the Board indicated that it intended to discontinue the stream of Board and staff interpretations. Instead, it proposed to have its staff issue a textual "commentary" on the Regulation.[96] This commentary would have the same status as an Official Staff Interpretation, that is, compliance with it would protect a creditor from sanctions. The Commentary would be updated periodically to reflect new staff thinking. The idea was to parallel in a general way the structure of the UCC, whose "Comments" are authoritative, although not part of the statute itself.

The Board followed through on the idea and its staff issued the original Commentary in April 1981.[97] It has been updated several times since.[98]

Some observations about the Commentary are in order. To the extent it contains more thoughtful and reflective responses to compliance issues, it seems superior to the prior flow of ad hoc letter interpretations. It is generally clear and readable, although necessarily more general than the earlier fact-specific staff letters. But it is also much more than a mere elaboration on Regulation Z. In many common situations, the only source of a clear answer is the Commentary.[99] In other situations, the Commentary clearly embellishes the Regu-

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96. *Cf.* 46 Fed. Reg. 20,848 (1981).

97. 46 Fed. Reg. 50,228 (1981).

98. Official updates to the original 1981 Commentary have been promulgated in 47 Fed. Reg. 41,338 (1982); 48 Fed. Reg. 14,882 (1983); 49 Fed. Reg. 13,482 (1984); 49 Fed. Reg. 40,560 (1984); 50 Fed. Reg. 13,181 (1985); 51 Fed. Reg. 11,422 (1986); 52 Fed Reg. 10,875 (1987); 53 Fed. Reg. 11,047 (1988); 54 Fed. Reg. 9,417 (1989); 55 Fed. Reg. 13,103 (1990); 56 Fed. Reg. 13,751 and 22,200 (1991); 58 Fed. Reg. 17,803 (1993); 60 Fed. Reg. 16,771 (1995); 61 Fed. Reg. 3,177 (1996); 61 Fed. Reg. 14,952 (1996); 62 Fed. Reg. 10,193 (1997); 63 Fed. Reg. 16,669 (1998); 64 Fed. Reg. 16,614 (1999); 65 Fed. Reg. 17,129 (2000); 65 Fed. Reg. 70,465 (2001); 66 Fed. Reg. 57,849 (2002); 67 Fed. Reg. 16,980 (2002); 67 Fed. Reg. 61,769 (2003); 68 Fed. Reg. 16,185 and 50,965 (2003); 69 Fed. Reg. 16,769 (2004); 69 Fed. Reg. 50,298 (2004) and 70 Fed. Reg. 46066 (2005) (annual adjustment to dollar amount that the triggers requirements for so-called high fee/high rate home mortgages.). The Board staff intends, as necessary, to issue such updates regularly in the spring of each year (but determined no update was necessary for 1992, 1994, or 2005).

Although constituting only unofficial background, the explanatory material published in the Federal Register, along with each set of proposed and adopted Commentary revisions, often helps shed light on the purposes of the changes. *See also* a brief overview of recent Commentary updates, *infra* at ¶1.03[2][c].

99. For example, on the question of whether credit for investment in rental property is covered by the law. *See* primary text ¶2.04[2]. Another Commentary example involves guidance on disclosure of per diem interest. "If the amount of per-diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures are not labeled as estimates." *See* 62 Fed. Reg. 10,193, 10,197 (codified at 12 C.F.R. 226, Supp. I, cmt. 17 (c)(2)(ii)-(1)(1998)); Kathleen E. Keest et al., *1997 Truth in Lending Developments,* 53 Bus. Law. 971, 976 (1998).

lation in ways a creditor might not expect.[100] In yet other instances, the Commentary seems to impose affirmative duties that are nowhere suggested or implied in the Regulation proper.[101] The net effect is that, in counseling clients, the Board staff's Commentary is indispensable source material.

Questions about the Commentary will inevitably come up in litigation. Is a creditor protected if its conduct is arguably, although not explicitly, approved in the Commentary? May a creditor be held liable for failing to make a disclosure in the manner specified in the Commentary if that method is not literally required by Regulation Z? Will periodic (annual) updates be frequent enough to keep the Commentary in line with the market? While the adequacy of the Commentary as compliance advice may be problematic, there seems little doubt about its authoritativeness in private litigation. Not only does the statute say that creditors are immune from liability if they conform to official staff advice[102] (i.e., the Commentary), but the Supreme Court has also held that Board staff interpretations are to be considered binding in civil litigation unless "demonstrably irrational."[103] The Commentary therefore becomes an essential operational handbook for TIL compliance.

With the issuance of the Commentary, all prior Board and staff interpretations are withdrawn; none of the prior material can be cited as authoritative on issues under the new Regulation Z. In fact Commerce Clearing House has designated its compilations of the staff letters as superseded and out of print. This book occasionally refers to those older letters, but these references are by way of illustration and not as controlling authority.

The old "fifth level" of staff guidance, information gathered informally by telephone or personal visit, still exists. With the reduction in formal written guidance, it perhaps assumes greater importance than before because many interpretive issues do not get treatment in the Commentary. But there is a real question as to how much reliance may be placed on such informal responses. Certainly, a response over the phone, for example, permits one to understand how a knowledgeable Board staff member (or members, as there often is consultation) views the issue presented. But issues raised and addressed in this way are often broad and may involve policy considerations: such an informal response may be too simplistic and discretionary a method for giving guidance. A more appropriate approach may be less reluctance by staff to expand the Commentary or perhaps an interim level of guidance between oral staff responses and the Commentary itself, such as selected and carefully written re-

100. For example, as to what is permissible "additional information" that may be included with the federal disclosures for closed-end credit. *See* primary text ¶ 5.04[2].

101. For example, the disclosure required for discounted variable rate open-end credit plans of what the annual percentage rate would currently be based on the formula or index used to make future rate adjustments. Commentary ¶ 226.6(a)(2)-10.

102. TIL Act § 130(f), 15 U.S.C. § 1640(f).

103. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980). *See also* Riviere v. Banner Chevrolet, Inc., 184 F.3d 457, at 461 (5th Cir. 1999). The implications of *Milhollin* are discussed in the primary text at ¶ 12.05[1]. However, the Commentary will not apply retroactively when a new comment is issued to change an existing interpretation and not merely clarify it. Clay v. Johnson, 50 F. Supp. 2d 816 (N.D. Ill. 1999).

sponses that become annotations to the Commentary.[104] At the very least, the staff could be more forthcoming in the "explanatory material" that accompanies Commentary updates in the Federal Register.[105]

[c] Summary of Recent Revisions to the Commentary

[i] 2002 Commentary Revisions. In 2002 the Board revised the Commentary to clarity the TIL disclosure requirements with respect to vehicle installment sales contracts where the disclosures are included in the same document with the sales and credit contracts.[106] Revised comment 17(b)-3 clarifies that creditors can satisfy the requirement to provide the disclosures to the consumer in a form the consumer may keep, before consummation, by giving the consumer one copy of the document (containing the disclosures) to read and sign. The creditor cannot merely show the document and disclosures to the consumer before consummation.[107]

The 2002 revisions also clarify what constitutes a "business day" for purposes of the right of rescission (only the specified date of a holiday is a legal holiday), and clarify the disclosures necessary to exempt insurance premiums and debt cancellation fees from the finance charge.[108]

[ii] 2003 Commentary Revisions. The Board's amendments to the Commentary in 2003 primarily focused on credit cards.[109] The revisions were effective April 3, 2003 and mandatory as of October 1, 2003.[110] There was no action on checking account overdraft ("bounce") protection plans.[111] A proposal was adopted to provide that an expedited payment fee is not a finance charge and need not be disclosed until and unless that service is requested by the consumer.[112] The same is true for an expedited credit card delivery fee.[113] A pro-

104. The authors of this book are old enough to realize that this suggestion sounds like a reincarnation of the old, unofficial staff Public Information Letters. One difference is that those letters were a freestanding mass of interpretive material, whereas the letters envisioned here would be integrated with the existing black-letter Commentary. Another is that the old letters tended to be fact-specific; the responses suggested here would be more general, so that numerous responses based on slight factual variation would be unnecessary.

105. A classic example of where Commentary changes may treat significant matters in a delphic manner is the handling of fees for the "non-use" of a credit card. *See* primary text ¶3.02[2][b].

106. Truth in Lending, 67 Fed. Reg. 16,980 (April 9, 2002).

107. *Id.,* at 16,981. *See also* Spearman v. Tom Wood Pontiac-GMC, Inc., 312 F.3d 848 (7th Cir. 2002).

108. *Id.*

109. Truth in Lending, 68 Fed. Reg. 16,185 (April 3, 2003).

110. *Id.*

111. *Id. See generally* Sam Davis and Stanley D. Mabbitt, *Checking Account Bounce Protection Programs,* 57 Consumer Fin. L.Q. Rep. 26 (2003). On May 26, 2004, the federal banking regulatory agencies (the OCC, Board, FDIC, OTS, and NCUA) issued a proposed Interagency Guidance on Overdraft Protection Programs. The proposed Guidance prescribes certain "best practices" for financial institutions to follow, but does not subject overdraft protection programs to the TILA or require TIL disclosures. *See* Interagency Guidance on Overdraft Protection Programs, 69 Fed. Reg. 31,858 (June 7, 2004).

112. 68 Fed. Reg. at 16,186.

113. *Id.*

posed comment characterizing expedited payment charges as "other charges," subject to the TIL disclosure requirements, was dropped.

The 2003 revisions also provide new guidance as to "replacement" cards, issued in varying sizes and formats to supplement the customer's existing credit card.[114] Card issuers may replace an existing credit card with multiple substitute cards only in limited circumstances, *i.e.,* where the replacement cards merely access the same accounts as the previous card, are subject to the same terms and conditions, and there is no increase in the consumer's liability for unauthorized use.[115]

The 2003 Commentary revisions provide new guidance on the treatment of private mortgage insurance (PMI) premiums (terms that affect the monthly payment must be reflected in the payment schedule); the revisions also provide that the index of a comparable U.S. Treasury security yield, used to determine the trigger for application of the HOEPA/Regulation Z section 32 "high cost" mortgage disclosures, must be measured as of the fifteenth day of the month immediately preceding the month of the loan application.[116] The latter eliminates the previous option of using the actual results of U.S. Treasury auctions, instead requiring use of the yields on traded issues adjusted to a constant maturity as listed in the Board's "Selected Interest Rates" (statistical release H-15) on the Board's website.[117]

[iii] 2004 Commentary Revisions. The 2004 revisions to the Commentary were effective April 1, 2004, and became mandatory October 1, 2004.[118] The 2004 revisions clarify that when Regulation Z requires disclosure of an "amount," this requires a numerical disclosure (which must be a dollar amount unless otherwise specified).[119]

The 2004 Commentary revisions also clarify issues relating to exercise of the right of rescission. If the creditor has not specified an address for receipt of the consumer's notice that the consumer is exercising the right of rescission, the consumer may deliver the notice to the same person or address as where the loan payments are made. The Board also addressed the sequence of rescission events. The consumer's obligation to repay funds advanced by the creditor is triggered by tender by the creditor of any money or property received by the creditor or paid by the consumer. Courts often treat this as a mutual exchange and condition each party's obligation on performance by the other party, *e.g.,* on equitable grounds.[120] The 2004 Commentary revision notes that this equi-

114. *Id.,* at 16,187.
115. *Id.,* at 16,187-16,188.
116. 68 Fed. Reg. at 16,185, 16,189-16,190. *See also* Regulation Z, 12 C.F.R. §§ 226.18(g), 226.31-226.32. *See generally* primary text and this supplement ¶ 6.09.
117. *Available at* http://www.federalreserve.gov/releases/h15/update.
118. Truth in Lending, 69 Fed. Reg. 16,769 (Mar. 31, 2004).
119. This was intended to reject a 7th Circuit U.S. Court of Appeals decision to the contrary. *See* Carmichael v. The Payment Center, Inc., 336 F.3d 636, 640 (7th Cir. 2003). *See* note 6, *supra* this supplement, and *generally infra* this supplement Ch. 8.
120. *See* primary text and this supplement Ch. 8.

table remedial practice does not alter the substantive effects of the Board rule: To determine whether rescission is allowed as a substantive law matter, the court would first consider whether the right exists and if so what amounts are owed by the creditor, before determining what equitable conditions should be imposed on the process of tendering that performance.

In the 2004 Commentary revisions, the Board declined to further define the TIL requirement that disclosures be "clear and conspicuous."

Also in 2004, the Board, as required, adjusted the dollar amount that triggers requirements for so-called high fee/high rate home mortgages; the adjusted dollar amount for 2005 is $510, effective January 1, 2005. 69 Fed. Reg. 50, 298 (August 16, 2004).

[iv] 2005 Commentary Revision. Adjustment of dollar amount trigger for high fee/high rate home mortgages to $528; 70 Fed. Reg. 46,066 (2005).

[v] 2006 Commentary Revision. Adjustment of dollar amount trigger for high fee/high rate home mortgage to $547; 71 Fed. Reg. 46,388 (2006).

[3] Litigation

The original TIL Act provided that, for any violation, an aggrieved consumer could sue to recover statutory damages of twice the finance charge (no less than $100 and no more than $1,000), plus attorneys' fees and costs, and Congress later amended the Act to permit recovery of actual damages.[121] This formula created a considerable inducement for consumers to sue, and they did. As a result, there was a torrent of reported case law construing the TIL requirements.[122]

121. TIL Act § 130(a), 15 U.S.C. § 1640(a). This remains the general approach, but the TIL Act now limits the violations for which statutory damages are recoverable.

In 1995 the statute was further amended to provide a minimum and maximum recovery of $200 and $2,000 in an individual action relating to a credit transaction not under an open-end credit plan that is secured by real property or a dwelling. Interestingly, this amendment upset a long-standing interpretation that the statutory minimum ($100) and maximum ($1000, for other than open end credit secured by real estate or a dwelling) applied as to both statutory damages for credit transactions and leases. The court in Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943 (7th Cir. 1997), correctly decided, notwithstanding the poor drafting, that the amendment was not intended to upset that interpretation, but only to provide a more generous (to consumers) minimum and cap on statutory damages where open end real estate secured credit was involved. In contrast, the court in Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003), in a more literalistic reading, confined the $100 minimum, $1000 maximum limitation to leases, on the basis to not do so would render meaningless the maximum and minimum articulated in the amendment. The Supreme Court has granted certiorari, 124 S. Ct. 1144 (2004). *See also infra* this supplement ¶ 1.05[2][g][vi].

122. *See* primary text ¶ 1.02[2] and *supra* this Supplement ¶ 1.02[4]. Beginning in 1979, the American Bar Association, Section of Business Law, Consumer Financial Services Committee has reviewed this case law in its *Annual Survey,* published in *The Business Lawyer. See, e.g.,* Willenzik & Leymaster, *Recent Trends in Truth in Lending Litigation,* 35 Bus. Law. 1197 (1980). However, due to the previously noted decline in litigation, at least one *Annual Survey* has not discussed TIL litigation. *See* Chamness, Miller, Cook and Harrell, *Introduction to the 1994 Annual Survey of Consumer Financial Services Law,* 49 Bus. Law. 1291 (1994). This

Following the substantial rewrite of the TIL Act and Regulation Z as well as the establishment of the Commentary (implicitly blessed by the Supreme Court), an important question, therefore, is the status of the case law construing the earlier Act and Regulation. To what extent is that body of judicial construction still valid precedent? The probable answer is that, in the aggregate, prior case law will have and ought to have very little stare decisis effect on litigation under the new Regulation Z. This is for the obvious reason that if the controlling regulatory provision has changed, technical judicial constructions of the earlier law cannot automatically carry over.

But to this general conclusion there are some necessary qualifications. Where the present regulatory rule is literally or substantively the same as before, judicial interpretations of that rule are still pertinent. In addition, there were many procedural issues under the original TIL Act—such as the permissibility of creditor collection counterclaims in federal court—on which the Act is silent; here too the prior case law continues to be precedential.

Before the effective date of the "simplified" TIL Act, TIL questions had been before the Supreme Court of the United States on five occasions. The holdings in two of those cases have been rendered moot by the revisions to the Act.[123] A third case,[124] construing what is "consumer credit" subject to the credit billing provisions of the TIL Act, remains good law, and was not affected by the Simplification Act changes. The remaining two cases continue to be of particular importance to the TIL regulatory scheme. *Mourning v. Family Publications Service, Inc.*,[125] decided in 1973, affirmed the authority of the Board to expand and elaborate on the statute in the implementing regulation (Regulation Z). *Ford Motor Credit Co. v. Milhollin,*[126] a 1980 decision, instructed all the lower courts to defer virtually absolutely to the views of the Board staff in construing the requirements of the law, and to desist from imposing new requirements of the courts' own making. It is this holding that underscores the importance of the staff's Commentary.

Since TIL "simplification," several courts have decided cases involving the authority of or procedure used by the Board. For example, in *Hickey v. Great Western Mortgage Corporation,*[127] the court found that the Board's revisions of Regulation Z were intended only to clarify the general third party rule regarding finance charges, not to make a substantive change in the law. Thus, the court

"trend," however, did not continue. *See, e.g.,* Cook & Meredith, *Truth in Lending Developments in 1994,* 50 Bus. Law. 1039 (1994) and Cook & Wisner, *Truth in Lending—A Whirlwind Year,* 51 Bus. Law. 861 (1996). *See also* Keest, Meredith, and Yen, *1997 Truth in Lending Developments,* 53 Bus. Law. 971(1998), and subsequent Annual Surveys.

123. Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981); Anderson Bros. Ford v. Valencia, 452 U.S. 205 (1981).

124. American Exp. Co. v. Koerner, 452 U.S. 233 (1981).

125. 411 U.S. 356 (1973).

126. *See supra* note 103.

127. 1995 WL 317095 (N.D. Ill. 1995) (not published). *See also,* as to the Commentary, Clay v. Johnson, 50 F. Supp. 2d 816 (N.D. Ill. 1999) (Commentary will not apply retroactively when it changes rather than clarifies the law).

was able to apply the clarified rule retroactively to a dispute brought under an earlier version of the Regulation. Similarly, in *Cowen v. Bank United of Texas, FSB,*[128] the court held that the clarified Regulation Z was entitled to weight as an interpretation of the TIL Act, although it had been issued after the transaction in question. In *Consumers Union of U.S., Inc. v. Federal Reserve Bd.,*[129] a consumer group asserted that regulations issued by the Board, which implemented amendments to the TIL concerning disclosure in a manner different than the consumer's group believed was required, were in violation of Congressional intent. The court upheld much of the flexibility the Board had built into the Regulation, but remanded some points for the lower court to consider further in instances where the statute was quite explicit. In a recent decision by the Third Circuit Court of Appeals, *Aronson v. Peoples Natural Gas Co.,* 180 F.3d 558 (3rd Cir. 1999), a customer sued the natural gas company alleging violations of the Truth in Lending Act. The customer claimed that the Board exceeded its authority by creating a blanket exemption for public utilities under Regulation Z section 226.3(c). In addition, he claimed that the TILA, 15 U.S.C. section 1603(4), requires a case-by-case determination whether the specific utility is exempt. The court held that the TILA grants the Board broad power to implement the TIL Act and does not require the Board to make a fact-specific determination in every public utility exemption claim. These cases and others seem to indicate that, on the whole, the Board will continue to be upheld.

In 1997 the Seventh Circuit Court of Appeals cast serious doubt on an interpretation that appeared in the 1997 Official Staff Commentary update. In *Gibson v. Bob Watson Chevrolet-GEO, Inc.*,[130] the Seventh Circuit interpreted a "may" in the Commentary to mean "shall." If interpreted otherwise, the court reasoned, the Commentary would have been in conflict with the requirements of the TIL Act. In fact, the court goes as far as suggesting that even reading the "may" as a "shall" produces a result that stretches the Act "as far as, if not farther than, the statute will stretch."[131] The Seventh Circuit's reliance on the Commentary, at least its reading of the Commentary, pays lip service to the authority of the Commentary, but clearly the court substituted its interpretation of the TIL Act for that of the Board's staff.

In 2004, the federal district court for Kansas negated a part of Regulation Z, holding in *In re Stanley*, 315 B.R. 602, 615 (Bankr. D. Kan. 2004), that 12 C.F.R. § 226.23(d)(4) is not a permissible interpretation of 15 U.S.C. § 1635(b) because voiding a security interest is a "step to be followed" or "action to be taken," not a consequence of voiding a security interest. Rescission "does not mean an annulment that is definitely accomplished by unilateral pronouncement, but rather a remedy that restores that status quo ante," and the voiding

128. 70 F.3d 937 (7th Cir. 1995).
129. 938 F.2d 266 (D.C. Cir. 1991).
130. 112 F.3d 283 (7th Cir. 1997).
131. *Id.* at 286.

of the security interest is a step in the procedure outlined in TILA § 1635(b) that begins upon a creditor's receipt of the notice of rescission from a debtor.

[4] Literature

It would be fruitless to attempt to catalog all the available writings about TIL. Much of the earlier literature is outdated by the amendments made to the Act in 1980. But some materials may have more enduring value, either as background for the present law or because they deal with the broader policy issues of TIL. What follows is a sampling of the more useful general materials. Articles dealing with specific TIL questions are cited throughout this book.

On credit disclosure policy generally:

Davis, *Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts,* 63 Va. L. Rev. 841 (1977).

Durkin & Elliehausen, 1977 Consumer Credit Survey (Federal Reserve Board, 1978).

Garwood, Hobbs and Miller, *Consumer Disclosure in the 1990s,* 9 Ga. State U. L. Rev. 777 (1993).

Kripke, *Gesture and Reality in Consumer Credit Reform,* 44 N.Y.U. L. Rev. 1 (1969).

Rubin, *Legislative Methodology: Some Lessons from the Truth in Lending Act,* 80 Geo. L. J. 233 (1991).

Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis,* 127 U. Pa. L. Rev. 630 (1979).

White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New Car Buyers and Auto Loans,* 69 Mich. L. Rev. 1207 (1971).

Whitford, *The Function of Disclosure Regulation in Consumer Transactions,* 1973 Wis. L. Rev. 400.

Specifically on TIL:

Federal Reserve Board, Annual Reports to Congress on Truth in Lending (1969 to present).

Garwood, *A Look at Truth in Lending—Five Years Later,* 14 Santa Clara L. Rev. 491 (1974).

Landers, *The Scope of Coverage of the Truth in Lending Act,* 1976 Am. B. Found. Research J. 565.

Landers, *Determining the Finance Charge Under the Truth in Lending Act,* 1977 Am. B. Found. Research J. 45.

Landers, *Some Reflections on Truth in Lending,* 1977 U. Ill. L.F. 669.

Landers & Chandler, *The Truth in Lending Act and Variable-Rate Mortgages and Balloon Notes,* 1975 Am. B. Found. Research J. 35.

Landers & Rohner, *A Functional Analysis of Truth in Lending,* 26 U.C.L.A. L. Rev. 711 (1979).

McLean, *The Federal Consumer Credit Protection Act,* 24 Bus. Law. 199 (1968).

Miller, *Truth in Lending Act,* 34 Bus. Law. 1405 (1979).

National Commission On Consumer Finance, Consumer Credit In The United States, Ch. 10 (1972).

Willenzik & Leymaster, *Recent Trends in Truth in Lending Litigation,* 35 Bus. Law. 1197 (1980).

Wilenzik & Schmelzer, *Truth in Lending Activities During 1980,* 36 Bus. Law. 1133 (1981).

Elwin Griffith, *The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z,* 40 Hous. L. Rev. 345 (2003).

Michael S. Barr, *Banking the Poor,* 21 Yale J. on Reg. 121 (2004).

Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation,* 88 Minn. L. Rev. 518 (2004).

John A. Marold, *Consumer Protection Issues: Third Circuit's Decision in Roberts v. Fleet Bank: Thinking Outside of the "Schumer Box" or "Consumerism Gone Berserk?,"* 8 N.C. Banking Inst. 399 (2004).

Kimm Tynan, *Pennsylvania Welcomes Predatory Lenders: Pennsylvania's Act 55 Preempts Philadelphia's Tough Ordinance But Provides Little Protection for Vulnerable Borrowers,* 34 Rutgers L.J. 837 (2003).

TIL After Simplification:

Boyd, *The Truth in Lending Simplification and Reform Act—A Much Needed Revision Whose Time Has Finally Come,* parts I and II, 23 Ariz. L. Rev. 1, 549 (1981).

Clontz & Douglas, Truth-In-Lending Manual (6th ed. 1991).

Cook, *Statutory Protection—Real and Perceived—For Truth in Lending Mistakes,* 48 Consumer Fin. L.Q. Rep. 189 (1994).

Dawes, *Overview of Recent Developments in Truth in Lending,* 48 Consumer Finance L.Q. Rep. 450 (1994).

Federal Reserve Board, Regulatory Analysis of Revised Regulation Z, 46 Fed. Reg. 20,941 (1981).

Ginsberg, Jacobs & Barr, *Truth in Lending,* 38 Bus. Law. 1271 (1983).

Griffith, Truth in Lending—*Rescission, Consumer Remedies and Creditor Defenses in Closed-End Transactions,* 19 U. Tol. L. Rev. 491 (1988).

Keest & Klein, Truth In Lending (3d ed. 1995).

Marrinan & Schellie, *Truth in Lending Simplification,* 37 Bus. Law. 1297 (1982).

Rohner, *Truth in Lending "Simplified": Simplified?* 56 N.Y.U. L. Rev. 999 (1981).

Rothstein, *Truth in Lending: The Right to Rescind and the Statute of Limitations,* 14 Pace L. Rev. 633 (1994).

Schmelzer & Chamness, *Truth in Lending: A Year of Calm Consolidation*, 39 Bus. Law. 1225 (1984).

Shindler & Yura, *Advertising Consumer Credit Terms in Compliance with Truth in Lending*, 66-JUL Chi. B. Re. 16 (1984).

Symposium on Truth in Lending, 9 Okla. City U.L. Rev. 1-147 (1984).

Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability,* 70 U. Chi. L. Rev. 1203 (2003).

Christopher L. Peterson, *Truth, Understanding and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act,* 55 Fla. L. Rev. 807 (2003).

Siddhartha Venkatesan, *Abrogating the Holder in Due Course Doctrine in Subprime Mortgage Transactions to More Effectively Police Predatory Lending*, 7 N.Y.U.J. Legis. & Pub. Pol'y 177 (2003).

Various, Annual Surveys of Consumer Financial Services Law for the Business Lawyer.

Timothy P. Meredith and Barbara S. Mishkin, *Truth in Lending Update*, 58 Consumer Fin. L.Q. Rep. 194 (2004).

Judith M. Scheiderer, *TILA Regulation and Litigation Update*, 59 Consumer Fin. L.Q. Rep. 162 (2005).

Robert A. Cook and Nicole F. Munro, *Concerns About the Federal Reserve Board Implementation of the E-Sign Act As It Relates to the Truth in Lending Act and Regulation Z*, 56 Consumer Fin. L.Q. Rep. 34 (2002).

¶ 1.05 Recent Developments

[1] Interim Rule on Electronic Disclosures

[a] Introduction

The Federal Reserve Board (Board) issued an Interim Rule on electronic Truth in Lending (TIL) disclosures in March 2001,[132] and then lifted or postponed the mandatory effective date (originally set for October 1, 2001) for those rules in August 2001.[133] As a result, the Interim Rules remain in place, but compliance is not mandatory until a future date yet to be announced by the Board.

As will be discussed in [2] below, in April 2007, the Board requested public comment on proposed amendments to Regulation Z that would withdraw portions of the Interim Rule. In addition, the Proposed Rule would amend Regulation Z to provide that when an application, solicitation, or advertisement is accessed by a consumer in electronic form, certain disclosures must be provided to the consumer in electronic form on or with the application, solicitation, or advertisement. In those circumstances, the consumer consent and other provisions of the Electronic Signatures in Global and National Commerce Act (ESIGN),[134] would not apply. The Proposed Rule would also implement certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Electronic documents and signatures have the same validity as paper documents and handwritten signatures. The requirements under the Act have been discussed in detail elsewhere and that general discussion is not repeated here.[135] ESIGN also contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in electronic form only if the consumer affirmatively consents after receiving certain information specified in ESIGN. The Board and other government agencies are permitted to interpret the consumer consent requirements within prescribed limits, but

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132. 66 Fed. Reg. 17,329 (2001).

133. 66 Fed. Reg. 41,439 (2001). *See also infra* this Supplement at ¶ 6.01[5].

134. 15 U.S.C. §§ 7001-7006 (2001).

135. *See, e.g.,* Jeremiah S. Buckley and Margo H.K. Tank, *Electronic Signatures—Changing the Financial Landscape,* 54 Consumer Fin. L.Q. Rep. 116 (2000); Robert Cook, Tim Meredith, Elizabeth Yen, *The Electronic Signatures in Global and National Commerce Act—A Review of the Act's Consumer Disclosure Requirements,* 54 Consumer Fin. L.Q. Rep. 315 (2000). The Uniform Electronic Transactions Act (UETA) accomplishes these same purposes under state law in the states that have enacted the UETA, without the ESIGN consent and disclosure requirements discussed in this Supplement. However, the UETA does not apply to federal law requirements such as those discussed in this Supplement; therefore, federal law requirements must be met under ESIGN, even in UETA states. *See, e.g.,* Leonard A. Bernstein, *The States Begin the Millennium Under the Electronic Transactions Act,* 55 Consumer Fin. L.Q. Rep. 250 (2001); Donald C. Lampe, *The Uniform Electronic Transactions Act and Federal ESIGN Law: An Overview,* 55 Consumer Fin. L.Q. Rep. 255 (2001).

may not impose additional requirements for consumer consent. It is generally assumed that the Board delayed the mandatory effective date of the Interim Rule, partly because the Board recognized that it strayed beyond the authority granted by ESIGN to promulgate regulations implementing ESIGN.

The Interim Rule imposes significant requirements and restrictions on the use of electronic records to provide consumer disclosures otherwise required by the Truth in Lending Act (TIL Act).[136] Some of these requirements and restrictions apparently exceed the authority that regulators have under ESIGN and impose additional burdens and significant costs on electronic commerce. Specifically, the required use of e-mail and the accompanying 90-day retention requirement imposed by the Interim Rule raise significant concerns. These requirements are in addition to the requirements imposed by ESIGN and are not clearly authorized by ESIGN. In addition, the required use of e-mail by the Interim Rule imposes a technology-specific requirement, which ESIGN prohibits.

Furthermore, the Board has determined, in the adoption of the Interim Rule, that certain advertising, application and solicitation disclosures are not subject to the electronic consumer disclosure consent provisions of ESIGN. By doing so, the Board suggests that these types of disclosures are not subject to the federal preemptive authority of ESIGN. Such a position invites state regulators and other federal agencies to impose restrictions and requirements with respect to other, similar state and federal disclosures. The result could be an unworkable patchwork of limitations and restrictions on electronic commerce. The following discussion describes the requirements imposed in the Interim Rule in connection with open-end credit.

[b] Definition

An electronic communication is defined in the Interim Rule to include a message transmitted electronically, between a creditor and a consumer, where the message is in a format that allows visual text to be displayed on equipment, such as a personal computer.[137] Audio and voice-response equipment are not included because they do not allow visual text. Note, however, that systems designed to accommodate vision-impaired consumers may be required to provide disclosures using visual text and would, then, be covered.[138]

136. 15 U.S.C. §§ 1601-1666j. *See* Robert A. Cook and Nicole F. Munro, *Concern About the Federal Reserve Board Implementation of the ESIGN Act As It Relates to the Truth in Lending Act and Regulation Z,* 56 Consumer Fin. L.Q. Rep. 34 (2002).

137. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(a) (2001)).

138. This requirement is not contained in the text of the Interim Rule. It is contained in the supplementary information to the Interim Rule. *See* 66 Fed. Reg. 17,329, 17,334 (2001).

[c] General Rule

The general principle in the Interim Rule is that ESIGN authorizes the use of electronic disclosures, but that the disclosures themselves are otherwise subject to all of the requirements under the TIL Act and Regulation Z.[139] Prior to providing electronic disclosures, the creditor must disclose the requirements for accessing and retaining disclosures in that format, the consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery, and the creditor must provide the disclosures in accordance with the specified requirements.[140]

With certain exceptions identified below, a creditor must either send the applicable disclosures to the consumer's e-mail address, or post them to a website.[141] If the disclosures are posted to a website, the creditor must send a notice to the consumer that tells the consumer the disclosures are available. The creditor can deliver this notice to the consumer's e-mail address or postal address. The notice must identify the account involved and the address of the website or other location where the disclosure is available.[142] The e-mail address used for this purpose must be one that can receive messages from persons other than the creditor.[143] If the disclosure is posted to a website, the disclosure must remain available at that website for a period of not less than ninty days, measured from the later of the day when the disclosures are posted and the day the creditor sends notice to the consumer that the disclosures are available.[144] If an e-mail is returned to the creditor as undeliverable, the creditor must take certain additional reasonable steps to complete delivery,[145] including reviewing its files to determine whether the address it is using matches the address on file, as well as attempting delivery at any alternate e-mail address for the consumer that may be contained in the creditor's file.[146]

Transactions that are not subject to these rules include: advertisements (Regulation Z sections 226.16 and 226.24), credit and charge card applications and solicitations (Regulation Z section 226.5a), HELOC and ARM application disclosures (Regulation Z sections 226.5b and 226.19(b)), and the up-front disclosures required under Regulation Z section 226.17(g).

139. 12 C.F.R. Pt. 226.

140. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(b) cmt. 2 (2001)).

141. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(d) (2001)).

142. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(d)(2)(i) (2001)).

143. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(d)(1) cmt. 1 (2001)).

144. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(d)(1)(ii) (2001)).

145. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(e) (2001)).

146. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(e) cmt. 1 (2001)).

[d] Timing and Effective Delivery

When a creditor permits the consumer to consummate a closed-end transaction on-line, the creditor must require the consumer to access the disclosures required under Regulation Z section 226.18 before consummation. A creditor may satisfy this requirement with a link to the disclosures so long as the consumer cannot bypass the disclosures. Alternatively, the disclosures must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. The creditor is not required to confirm that the consumer has read the disclosures.

For disclosures that are not required to be segregated and thus may be interspersed into the text of another document, the creditor may satisfy the requirement to provide the disclosures if the document appears automatically or via a link, as described above. For example, when a creditor permits the consumer to open a credit card account and make a purchase immediately thereafter, disclosures required under Regulation Z section 226.6 must be provided before the first transaction. The creditor must require the consumer to access the disclosures (or the document containing the disclosures such as a credit card agreement) before the consumer consummates the agreement. The creditor is not required to confirm that the consumer has read the disclosures.[147]

[e] Timing and Effective Delivery: Periodic Disclosures

Regulation Z has a number of disclosures that must be provided periodically. Among these are periodic statements for open-end credit, an annual statement of billing rights for open-end credit, a change-in-terms notice for open-end credit, a notice of suspension/termination of HELOC advances, credit card renewal notices, notices in connection with credit card account insurance, responses to billing error notices, rescission notices, section 32 notices (Regulation Z section 226.32), and ARM adjustment notices. These are discussed in more detail in the primary text at Chapters 5-10 and, for Chapters 6 and 9, in this supplementary text as well. Under ESIGN and the Interim Rule, any periodic disclosure may be delivered to the consumer by e-mail or by posting to an Internet site. Disclosures provided by e-mail are timely based on when the disclosures are sent. Disclosures posted at an Internet site are timely based on when the creditor has both made the disclosures available and sent a notice alerting the consumer that the disclosures have been posted.[148]

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147. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(b) cmt. 3 (2001)).

148. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(b) cmt. 4 (2001)).

[f] Consumer Consent to Receive the Disclosure Electronically

The Interim Rule provides that a creditor must receive the consumer's consent to receive disclosures electronically, except in connection with disclosures provided under the following sections: advertisements (Regulation Z sections 226.16 and 226.24), credit and charge card applications and solicitations (Regulation Z section 226.5a), HELOC and ARM application disclosures (Regulation Z sections 226.5b and 226.19(b)), and the up-front disclosures required under Regulation Z section 226.17(g).[149]

[g] Form That May Be Kept

If the applicable federal regulation requires the creditor to deliver a disclosure in a form that the consumer may keep, the creditor can comply by delivering the electronic disclosures in a format that is capable of being retained (such as by printing or electronic storage). The format must also be consistent with the information required to be provided under ESIGN section 101(c)(1)(C)(I),[150] which concerns the hardware and software requirements for accessing and retaining electronic disclosures.[151]

[h] Disclosures Provided on Creditor's Equipment

If a creditor owns or controls the equipment used by the consumer to engage in a transaction (for example, a computer terminal in a creditor's lobby or an automated teller machine at a public kiosk), the creditor must ensure that the equipment satisfies the applicable federal regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the consumer may keep. For example, if disclosures are required at the time of an on-line transaction, the disclosures must be sent to the consumer's e-mail address or must be made available at another location such as the creditor's Internet web site, unless the creditor provides a printer that automatically prints the disclosures.[152]

[i] Credit Cards

The Interim Rule addresses three issues in connection with credit card applications and solicitations: the timing/location of the electronic disclosures, the

149. 66 Fed. Reg. 17,329, 17,339 (2001) (adding a new section, 12 C.F.R. § 226.36(c) (2001)).
150. 15 U.S.C. § 7001(c)(1)(C)(i) (2001).
151. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(b) cmt. 5 (2001)).
152. 66 Fed. Reg. 17,329, 17,341 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36(b) cmt. 6 (2001)).

timeliness of APR disclosures, and whether the applicable disclosures must be presented in a table format. Each of these is discussed below.

[i] Location. The Interim Rule provides that the consumer must be able to access the applicable disclosures at the time a blank credit card application or reply form is made available to the consumer on an Internet site or by e-mail. There are at least two alternate methods to accomplish this requirement. First, the creditor can place a link to the disclosures on the site or in the e-mail, so long as the consumer cannot bypass the link before submitting the application or reply form. Second, the creditor can place the applicable disclosures on the site or in the e-mail or the disclosures must automatically appear on the screen when the application or reply form appears. In this case, the creditor must clearly and conspicuously state that rate, fee and other cost information either precedes or follows the application or reply form. The creditor does not have to confirm that the consumer has read the disclosures.[153]

[ii] Timeliness of APR Disclosures. Historically, Regulation Z section 226.5a(b)(1) has required that creditors disclose the current Annual Percentage Rate (APR) if the plan is a fixed-rate plan and also disclose a rate that was actually in use within sixty days before mailing a direct mail solicitation or within thirty days before printing a take-one solicitation.[154] The Interim Rule provides that the APR is accurate in an e-mail solicitation if it is one that was in effect within thirty days before the e-mail delivery date. The APR is accurate on a website if the rate was in effect within the preceding thirty days.[155]

[iii] Tabular Format. Historically, Regulation Z required a creditor to provide the primary credit card disclosures in a tabular format in connection with direct mail solicitations. However, on a take-one solicitation, creditors had the option of disclosing the information in either a tabular format or including a statement that costs are involved with a toll-free telephone number and mailing address to contact for further information.[156] Under the Interim Rule, the tabular format requirement applies to all electronic disclosures.[157] Note that the Board relied on its exception authority under TIL Act sections 105(a) and 127(c)(5) to promulgate this requirement.[158]

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153. 66 Fed. Reg. 17,329, 17,339-17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.5a(a)(2) cmt. 8 (2001)).
154. *See* 12 C.F.R. § 226.5a(b)(1) (2001).
155. *See* 12 C.F.R. § 226.5a(b)(1)(iii) (2001).
156. *See* 12 C.F.R. § 226.5a(e)(3) (2001).
157. *See* 66 Fed. Reg. 17,329, 17,338 (2001) (revising 12 C.F.R. § 226.5a(c)).
158. *See* 66 Fed. Reg. 17,329, 17,332 (2001).

[j] HELOCs

The Interim Rule addresses two issues in connection with HELOC disclosures: the timeliness of the disclosures and the ability of third parties to make electronic disclosures. These are discussed below.

[i] Timeliness of HELOC Disclosures. Creditors are required to provide a home equity brochure and a home equity program disclosure to a consumer at the time a HELOC application is provided to the consumer.[159] The Interim Rule provides that the consumer must be able to access the applicable disclosures at the time a HELOC application or reply form is made available to the consumer on an Internet site or by e-mail. There are at least three alternate methods to accomplish this requirement. First, the creditor can place a link to the disclosures on the site or in the e-mail, so long as the consumer cannot bypass the link before submitting the application or reply form. Second, the creditor can place the applicable disclosures on the site or in the e-mail, or the disclosures must automatically appear on the screen when the application or reply form appears. In this case, the creditor must clearly and conspicuously state that rate, fee and other cost information either precedes or follows the application or reply form. The creditor does not have to confirm that the consumer has read the disclosures.[160]

[ii] Third Party Disclosures. If a third party is required to provide HELOC disclosures, the third party may use electronic disclosures, so long as the third party satisfies the same requirements that apply to creditors.[161]

[iii] Open-End Credit Rescission. As a general rule, a creditor must supply two copies of the notice of right to rescind to each consumer who owns the right to cancel a credit transaction.[162] That way, if a consumer mails one copy to the creditor to rescind the transaction, the consumer can retain one copy as an explanation of his or her rights during the rescission process. The Interim Rule provides that a creditor need only deliver one copy if delivery occurs by electronic communication.[163] The Interim Rule also requires that each co-owner must agree to receive disclosures electronically and must designate an electronic address for receiving the rescission notice.[164]

159. *See* 12 C.F.R. § 226.5b(b) (2001).
160. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.5b(b) cmt. 7 (2001)).
161. 66 Fed. Reg. 17,329, 17,338 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.5a(a)(2) cmt. 8 (2001)).
162. 12 C.F.R. § 226.15(b) (2001).
163. *See* 66 Fed. Reg. 17,329, 17,338 (2001) (revising 12 C.F.R. § 226.15(b) (2001)).
164. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.15 cmt. 1.v (2001)).

[k] Open-End Credit Advertising

Regulation Z requires a creditor to provide certain additional information to consumers if an advertisement contains certain trigger terms. If the advertisement is contained in a catalog or contains multiple pages, a creditor is permitted to place all of the required disclosures in a single table so long as the consumer was referred to the table each time a trigger term appeared in the document.[165] The table must include all required disclosures for a representative scale of credit amounts up to the level of the more commonly sold higher-priced items.[166]

Under the Interim Rule, creditors are permitted to apply the catalog rules in connection with advertisements delivered electronically. The Board's Official Staff Commentary has been amended to suggest that a creditor may use a link as one method to refer the consumer from the trigger term page to the page that contains the table.[167]

[l] Closed-End Credit; Deferred Disclosures

Regulation Z permits a creditor to make the usual preconsummation disclosures after consummation under certain limited conditions. Specifically, if a creditor receives a purchase order or a request for credit from a consumer by mail, telephone or facsimile, without face-to-face or telephone solicitation, the creditor may delay the disclosures until the due date of the first payment, provided the creditor has made certain information available to the consumer or the public before the order is received.[168] The Interim Rule provides that this exception does not apply where a creditor offers its products by electronic communication.[169]

[m] Adjustable Rate Mortgage Loans

Creditors are required to provide the *Consumer Handbook on Adjustable Rate Mortgages* and a loan program disclosure to consumers at the time an application for an ARM loan is provided to the consumer or before the consumer pays a nonrefundable fee, whichever is earlier.[170] The Interim Rule provides that the consumer must be able to access the applicable disclosures at the time the application is made available to the consumer on an Internet site or by e-mail. There are at least three alternate methods to accomplish this requirement. First,

165. *See* 12 C.F.R. § 226.16(c)(1) (2001).
166. *See* 12 C.F.R. § 226.16(c)(2) (2001).
167. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.16(c)(1) cmt. 2 (2001)).
168. 12 C.F.R. § 226.17(g) (2001).
169. 66 Fed. Reg. 17,329, 17,338 (2001) (adding new 12 C.F.R. § 226.17(g)(3) (2001)).
170. *See* 12 C.F.R. § 226.19(b) (2001).

the creditor can place a link to the disclosures on the site or in the e-mail, so long as consumers cannot bypass the link before submitting the application or reply form. Second, the creditor can place the applicable disclosures on the site or in the e-mail. Third, the disclosures may automatically appear on the screen when the application or reply form appears. If a link is not used, the creditor must clearly and conspicuously state that rate, fee and other cost information either precedes or follows the application or reply form. The creditor does not have to confirm that the consumer has read the disclosures.[171]

[n] Closed-End Credit Rescission

As a general rule, a creditor must supply two copies of the notice of right to rescind to each consumer who owns the right to cancel a credit transaction.[172] That way, if a consumer mails one copy to the creditor to rescind the transaction, the consumer will retain one copy as an explanation of his or her rights during the rescission process. The Interim Rule provides that a creditor need only deliver one copy if delivery occurs by electronic communication.[173] The Interim Rule also requires that each co-owner must agree to receive disclosures electronically and must designate an electronic address for receiving the rescission notice.[174]

[o] Closed-End Credit Advertising

Regulation Z requires a creditor to provide certain additional information to consumers if an advertisement contains certain trigger terms. If the advertisement is contained in a catalog or contains multiple pages, a creditor is permitted to place all of the required disclosures in a single table so long as the consumer was referred to the table each time a trigger term appeared in the document.[175] The table must include all required disclosures for a representative scale of credit amounts up to the level of the more commonly sold higher-priced items.[176]

Under the Interim Rule, creditors are permitted to apply the catalog rules in connection with advertisements delivered electronically.[177] The Board's Official Staff Commentary has been amended to suggest that a creditor may use

171. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.19(b) cmt. 2.v (2001)).

172. 12 C.F.R. § 226.23(b)(1) (2001).

173. *See* 66 Fed. Reg. 17,329, 17,340 (2001) (revising 12 C.F.R. § 226.23(b)(1) (2001)). A case that involved the assertion that only one copy of the notice of the right to rescind was supplied is Hammox v. Heartland Home Finance, Inc., 2005 WL 1130347 (E.D. Tenn. 2005).

174. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.23 cmt. 1.v (2001)).

175. *See* 12 C.F.R. § 226.24(d)(1) (2001).

176. *See* 12 C.F.R. § 226.24(d)(2) (2001).

177. *See* 66 Fed. Reg. 17,329, 17,338 (2001) (revising 12 C.F.R. § 226.24(d)(1) (2001)).

a link as one method to refer the consumer from the trigger term page to the page that contains the table.[178]

Finally, the Interim Rule provides that, in an advertisement delivered electronically, any time the creditor states a periodic rate, the consumer must be able to see the corresponding or equivalent APR. In this case, a link may not be used. The rates must appear side by side.[179]

[2] 2007 Proposed Rule on Electronic Disclosures

[a] Introduction

In April 2007, the Board requested public comment on proposed amendments to Regulation Z to clarify the requirements for providing consumer disclosures in electronic form.[180] As noted in ¶1.05[1] above, the Board published an Interim Rule to establish uniform standards for the electronic delivery of disclosures in March 2001. However, the mandatory compliance date for those rules was later lifted, in August 2001, and institutions have not been required to comply with the Interim Rule.[181] The Proposed Rule would simplify the Board's Interim Rules by: (1) withdrawing certain portions of the Interim Rule that restate or cross-reference provisions of ESIGN; (2) withdrawing provisions of the Interim Rule that may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection; and (3) retaining certain provisions of the Interim Rule that provide guidance on the use of electronic disclosures. Finally, the Proposed Rule would also implement certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[182] which mandates certain disclosures for online credit card solicitations. The comment period for the Proposed Rule ended sixty days after publication in the *Federal Register,* which occurred on April 30, 2007.

The Interim Rule allowed creditors to provide certain disclosures to consumers electronically, without regard to the consumer consent or other provisions of ESIGN, for disclosures provided on or with an application, solicitation, or advertisement. The Board reasoned that these disclosures, which would be available to the general public while shopping for credit, did not "relate to a transaction," which is a prerequisite for triggering the ESIGN consumer consent provisions, and thus were not subject to those provisions. Some commenters on the Interim Rule did not agree with the Board's rationale. The Board indi-

178. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.24(d) cmt. 4 (2001)).

179. 66 Fed. Reg. 17,329, 17,340 (2001) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.24(b) cmt. 6 (2001)).

180. 72 Fed. Reg. 21,141 (2007).

181. *See supra* note 133.

182. Pub. L. No. 109-8, 119 Stat. 23 (2005).

cated it does not believe it is necessary to determine whether or not these disclosures are related to a transaction and the Proposed Rules do not make such determinations.

Pursuant to the Board's authority under TIL Act section 105(a), as well as under section 104(d) of ESIGN,[183] the Proposed Rule specifies the circumstances under which certain disclosures may be provided to a consumer in electronic form, rather than in writing as generally required by Regulation Z, without obtaining the consumer's consent under section 101(c) of ESIGN. The Proposed Rule would also amend various sections of Regulation Z, discussed in detail below, to clarify that certain disclosures must be provided to the consumer in electronic form on or with an application, solicitation, or advertisement that is accessed by the consumer in electronic form.

The Board has indicated it continues to believe that creditors should not be required to obtain the consumer's consent in order to provide shopping or advertising disclosures to the consumer in electronic form if the consumer accesses an application, solicitation, or advertisement containing those disclosures in electronic form, such as at an Internet web site. However, the Board recognizes that consumers who shop or apply for credit online may not want to receive other disclosures electronically. Therefore, with respect to, for example, account-opening disclosures, periodic statements and change-in terms notices, creditors would be required to provide written disclosures or obtain the consumer's consent in accordance with ESIGN to provide such disclosures in electronic form. Finally, the Board proposes to delete, as unnecessary, certain provisions that restate or cross-reference ESIGN's general rules regarding electronic disclosures (including the consumer consent provisions) and electronic signatures because ESIGN is a self-effectuating statute.

The following discussion describes the requirements imposed in the Proposed Rule in connection with open-end credit.

[b] Open-End Credit Disclosures

Regulation Z requires creditors to provide open-end credit disclosures in writing and in a form that the consumer may keep.[184] Under the Proposed Rule, creditors may provide these disclosures to consumers in electronic form, subject

183. Section 105(a) of the TIL Act provides that regulations prescribed by the Board under TILA "may provide for such adjustments and exceptions . . . as in the judgment of the Board, are necessary or proper to effectuate the purposes of [TILA], . . . or to facilitate compliance [with the requirements of TILA]." Section 104(d) of ESIGN authorizes federal agencies to adopt exemptions for specified categories of disclosures from the E-Sign notice and consent requirements, "if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers." The Board indicated it believes that these criteria are met in the case of the application, solicitation and advertising disclosures. In addition, the Board has indicated it believes the TIL Act section 105(a) authorizes the Board to permit institutions to provide disclosures electronically, rather than in paper form, independent of ESIGN.

184. 12 C.F.R. § 226.5(a)(1) (2001).

to compliance with the consumer consent and other applicable provisions of ESIGN. In addition, the Proposed Rule provides that the open-end disclosures for credit and charge card applications and solicitations, HELOCs and open-end credit advertising may be provided to the consumer in electronic form, under the circumstances set forth in those sections, without regard to the consumer consent or other provisions of ESIGN.[185]

[c] Credit Cards

The Proposed Rule addresses three issues in connection with credit and charge card applications and solicitations: the timing/location of the electronic disclosures, the timeliness of APR disclosures, and whether the applicable disclosures must be presented in a table format. Each of these issues is discussed below.

[i] Location. The Proposed Rule provides that card issuers must provide the applicable disclosures on or with a blank application or reply form that is made available to the consumer in electronic form, such as on a creditor's Internet website.[186] Card issuers have flexibility in satisfying this requirement. For example, the disclosures could automatically appear on the website when the application or reply form appears. In the alternative, the disclosures could be located on the same web "page" as the application or reply form without necessarily appearing on the initial screen. In this case however, the application or reply form must contain a clear and conspicuous reference to the location of the disclosures and indicate that the disclosures contain rate, fee and other cost information, as applicable. Finally, the creditor could place a link to the applicable disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. The creditor does not have to confirm that the consumer has read the disclosures.[187]

[ii] Timeliness of APR Disclosures. Historically, Regulation Z section 226.5a(b)(1) has required that creditors disclose the current Annual Percentage Rate (APR) if the plan is a fixed-rate plan and also disclose a rate that was actually in use within sixty days before mailing a direct mail solicitation or within thirty days before printing a take-one solicitation.[188] The Proposed Rule provides that disclosures in direct mail applications and solicitations must be accurate as of the time the disclosures are mailed. The Proposed Rule also

185. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.5(a)(1) (2001)).
186. 72 Fed. Reg. 21,141 (2007) (adding new 12 C.F.R. § 226.5a(2)(v) (2001).
187. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.5a(a)(2) cmt. 8 (2001)).
188. *Supra* note 154.

implements the "updated regularly" standard in the BAPCPA with regard to the accuracy of variable APRs. An accurate variable APR is one in effect within sixty days before mailing. Further, disclosures provided in electronic form (except for a variable APR) must be accurate as of the time they are sent, in the case of disclosures sent to a consumer's e-mail address, or as of the time they are viewed by the public, such as on a website. An accurate variable APR provided in electronic form is one in effect within thirty days before it is sent to a consumer's e-mail address, or viewed by the public, as applicable.[189] Finally, the Proposed Rule provides that the APR for credit and charge card applications and solicitations made available to the general public must be accurate as of the date of printing. An accurate APR is one in effect within thirty days before printing.[190]

[iii] Tabular Format. Historically, Regulation Z required a creditor to provide the primary credit card disclosures in a tabular format in connection with direct mail solicitations. However, on a take-one solicitation, creditors had the option of disclosing the information in either a tabular format or including a statement that costs are involved with a toll-free telephone number and mailing address to contact for further information.[191] The Proposed Rule would make the direct-mail provisions applicable to both electronic applications and solicitations. For disclosures that are required to be provided in tabular form, card issuers must satisfy the requirements with respect to electronic disclosures set forth in staff comment section 226.5a(a)(2)-2(ii).[192]

[d] HELOCs

The Proposed Rule addresses two issues in connection with HELOC disclosures: the timeliness of the disclosures and the ability of third parties to make electronic disclosures. These issues are discussed below.

[i] Timeliness of HELOC Disclosures. Creditors are required to provide a home equity brochure and a home equity program disclosure to a consumer at the time a HELOC application is provided to the consumer.[193] The Proposed Rule provides that a creditor must provide the applicable disclosures on or with a HELOC application that is made available to the consumer in electronic form, such as on a creditor's website. Creditors have flexibility in satisfying this requirement. For example, the disclosures could automatically appear on the website when the application appears. In the alternative, the disclosures could

189. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.5a(c) (2001)).
190. 72 Fed. Reg. 21,141 (2007) (adding new 12 C.F.R. § 226.5a(e)(5) (2007)).
191. *Supra* note 156.
192. *Supra* note 187.
193. *Supra* note 159.

be located on the same web "page" as the application without necessarily appearing on the initial screen. In this case however, the application must contain a clear and conspicuous reference to the location of the disclosures and indicate that the disclosures contain rate, fee and other cost information, as applicable. Finally, the creditor could place a link to the electronic disclosures as long as consumers cannot bypass the disclosures before submitting the application. The creditor does not have to confirm that the consumer has read the disclosures or brochure.[194]

[ii] Third Party Disclosures. The Proposed Rule would delete the Interim Rule provision that if a third party is required to provide HELOC disclosures, the third party may use electronic disclosures, so long as the third party satisfies the same requirements that apply to creditors.[195]

[e] Open-End Credit Rescission

As a general rule, a creditor must supply two copies of the notice of right to rescind to each consumer who owns the right to cancel a credit transaction.[196] That way, if a consumer mails one copy to the creditor to rescind the transaction, the consumer can retain one copy as an explanation of his or her rights during the rescission process. The Proposed Rule would retain the Interim Rule provision that provides a creditor need only deliver one copy of the notice of the right to rescind to each consumer entitled to rescind if delivery occurs in electronic form in accordance with the consumer consent and other applicable provisions of ESIGN.[197] The Proposed Rule would delete the Interim Rule provision that each co-owner must agree to receive disclosures electronically and must designate an electronic address for receiving the rescission notice.[198]

[f] Open-End Credit Advertising

Regulation Z requires a creditor to provide certain additional information to consumers if an advertisement contains certain trigger terms.[199] If the advertisement is contained in a catalog or contains multiple pages, a creditor is permitted to place all of the required disclosures in a single table so long as the consumer was referred to the table each time a trigger term appeared in the document.[200] The table must include all required disclosures for a representative

194. 72 Fed. Reg. 21,141 (2007) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.5b(a)(1) cmt. 5 (2007)).
195. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.5b(c) (2001)).
196. *Supra,* note 162.
197. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.15(b) (2001)).
198. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.15(b) cmt. 1 (2001)).
199. 12 C.F.R. § 226.16(b) (2001).
200. *Supra* note 165.

scale of credit amounts up to the level of the more commonly sold higher-priced items.[201]

Under the Proposed Rule, creditors are permitted to apply the catalog rules in connection with an electronic advertisement, such as an advertisement appearing on an Internet website. When an advertisement is accessed by the consumer in electronic form (such as when the consumer views the advertisement on his/her computer) the applicable disclosures must be provided to the consumer in electronic form on or with the advertisement.[202] Providing these disclosures at a different time or place or in paper form would not comply. Conversely, if a consumer views a paper advertisement, the applicable disclosures must be provided in paper form on or with the advertisement. The Board's Official Staff Commentary would be amended to clarify the point that if a consumer receives a written advertisement in the mail, the creditor would not satisfy its obligation to provide the applicable disclosures at that time by including a reference in the advertisement to the website where the disclosures are located.[203] The Proposed Rule would retain the Interim Rule provision that a creditor may use a link as one method to refer the consumer from the trigger term page to the page that contains the table.[204]

The following discussion describes the requirements imposed in the Proposed Rule in connection with closed-end credit.

[g] Closed-End Credit; Deferred Disclosures

Regulation Z requires creditors to provide closed-end credit disclosures in writing and in a form that the consumer may keep.[205] Under the Proposed Rule, creditors may provide these disclosures to consumers in electronic form, subject to compliance with the consumer consent and other applicable provisions of ESIGN. In addition, the Proposed Rule provides that the closed-end disclosures for certain adjustable-rate mortgage loans secured by the consumer's principal dwelling (Regulation Z section 226.19(b)) and closed-end credit advertising (Regulation Z section 226.24) may be provided to the consumer in electronic form, and the disclosures required for mail, telephone or facsimile orders (Regulation Z section 226.17(g)) may be made available to the consumer or to the public in electronic form, under the circumstances set forth in those sections, without regard to the consumer consent or other provisions of ESIGN.[206]

Regulation Z permits a creditor to make the usual preconsummation disclosures after consummation under certain limited conditions. Specifically, if a

201. *Supra* note 166.
202. 72 Fed. Reg. 21,141 (2007) (adding new 12 C.F.R. § 226.16(c)(3) (2007)).
203. 72 Fed. Reg. 21,141 (2007) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.16(c)(3) cmt. 1 (2007)).
204. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.16(c)(1) cmt. 2 (2001)).
205. 12 C.F.R. § 226.17(a)(1) (2001).
206. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.17(a)(1) (2001)).

creditor receives a purchase order or a request for credit from a consumer by mail, telephone or facsimile, without face-to-face or telephone solicitation, the creditor may delay the disclosures until the due date of the first payment, provided the creditor has made certain information available to the consumer or the public before the order is received.[207] The Proposed Rule would retain the Interim Rule provision that provides this exception does not apply where a creditor offers its products by electronic communication.[208] However, where the exception does apply (*i.e.,* the consumer requests credit by telephone, mail or facsimile), the applicable disclosures may be made available to the consumer or to the public either in electronic form, such as at a creditor's website, without regard to the consumer consent or other provisions of ESIGN, or paper form.[209]

[h] Adjustable Rate Mortgage Loans

Creditors are required to provide the Consumer Handbook on Adjustable Rate Mortgages and a loan program disclosure to consumers at the time an application for an ARM loan is provided to the consumer or before the consumer pays a nonrefundable fee, whichever is earlier.[210] The Proposed Rule provides that a creditor must provide the applicable disclosures on or with a blank application that is made available to the consumer in electronic form, such as on a creditor's website.[211] Creditors have flexibility in satisfying this requirement. For example, the disclosures could automatically appear on the website when the application appears. In the alternative, the disclosures could be located on the same web "page" as the application without necessarily appearing on the initial screen. In this case however, the application must contain a clear and conspicuous reference to the location of the disclosures and indicate that the disclosures contain rate, fee, and other cost information, as applicable. Finally, the creditor could provide a link to the electronic disclosures as long as consumers cannot bypass the disclosures before submitting the application. The creditor does not have to confirm that the consumer has read the disclosures or brochure.[212]

[i] Closed-End Credit Rescission

As a general rule, a creditor must supply two copies of the notice of right to rescind to each consumer who owns the right to cancel a credit transaction.[213]

207. *Supra* note 168.
208. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.17(g) (2001)).
209. *Id.*.
210. *Supra* note 170.
211. 72 Fed. Reg. 21,141 (2007) (adding new 12 C.F.R. § 226.19(c) (2007)).
212. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.19(b) cmt. 2.v. (2001)).
213. *Supra* note 172.

That way, if a consumer mails one copy to the creditor to rescind the transaction, the consumer will retain one copy as an explanation of his or her rights during the rescission process. The Proposed Rule would retain the Interim Rule provision that provides a creditor need only deliver one copy of the notice of the right to rescind to each consumer entitled to rescind if delivery occurs in electronic form in accordance with the consumer consent and other applicable provisions of ESIGN.[214] The Proposed Rule would delete the Interim Rule provision that each co-owner must agree to receive disclosures electronically and must designate an electronic address for receiving the rescission notice.[215]

[j] Closed-End Credit Advertising

Regulation Z requires a creditor to provide certain additional information to consumers if an advertisement contains certain trigger terms.[216] If the advertisement is contained in a catalog or contains multiple pages, a creditor is permitted to place all of the required disclosures in a single table so long as the consumer was referred to the table each time a trigger term appeared in the document.[217] The table must include all required disclosures for a representative scale of credit amounts up to the level of the more commonly sold higher-priced items.[218]

The Proposed Rule would retain the Interim Rule provisions allowing creditors to apply the catalog rules in connection with an electronic advertisement, such as an advertisement appearing on an Internet website.[219] The Proposed Rule would add a new requirement that if an advertisement is accessed by the consumer in electronic form (such as when the consumer views the advertisement on his/her computer) the applicable disclosures must be provided to the consumer in electronic form on or with the advertisement.[220] Providing these disclosures at a different time or place or in paper form would not comply. Conversely, if a consumer views a paper advertisement, the applicable disclosures must be provided in paper form on or with the advertisement. The Board's Official Staff Commentary would be amended to clarify the point that if a consumer receives a written advertisement in the mail, the creditor would not satisfy its obligation to provide the applicable disclosures at that time by including a reference in the advertisement to the website where the disclosures are located.[221] The Proposed Rule would also retain the Interim Rule revisions

214. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.23(b)(1) (2001)).
215. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.23(b) cmt. 1. (2001)).
216. 12 C.F.R. § 226.24(c) (2001).
217. *Supra* note 175.
218. *Supra* note 176.
219. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.24(d)(1) and (2) (2001)).
220. 72 Fed. Reg. 21,141 (2007) (adding new 12 C.F.R. § 226.24(d)(3) (2007)).
221. 72 Fed. Reg. 21,141 (2007) (adding a new Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.24(d) cmt. 5 (2007)).

to the Board's Official Staff Commentary to suggest that a creditor may use a link as one method to refer the consumer from the trigger term page to the page that contains the table.[222]

Finally, the Proposed Rule would delete the Interim Rule provision that in an advertisement using electronic communication, the consumer must be able to view the corresponding or equivalent APR simultaneously, and that the requirement is not satisfied if the consumer can view the APR only by use of a link that takes the consumer to another location.[223]

[k] HOEPA and Reverse Mortgage Loans

Regulation Z requires creditors to provide the HOEPA and reverse mortgage loan disclosures in writing and in a form that the consumer may keep.[224] The Proposed Rule provides that the HOEPA and reverse mortgage disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of ESIGN.[225]

[l] Requirements for Electronic Communication

As noted in [2][a] above, the Proposed Rule would delete the cross-references to section 226.36 from Regulation Z, all of section 226.36 (which constitutes all of Subpart F) from Regulation Z, and the accompanying sections of the Staff Commentary.[226] The Proposed Rule would delete, as unnecessary, certain provisions that restate or cross-reference the ESIGN's general rules regarding electronic disclosures, including the consumer consent provisions and electronic signatures. Further, the Proposed Rule would delete the requirement to send the applicable disclosures to a consumer's e-mail address, or to post the disclosures on a website and send a notice alerting the consumer to the disclosures. In the Proposed Rule, the Board indicated it had reconsidered the required sending of disclosures by e-mail in light of concerns about data security, identity theft, and "phishing" that have become more pronounced since the Interim Rule was issued. In addition, the Proposed Rule would delete the 90-day retention requirement for disclosures posted on a website. However, the Board has indicated it will monitor creditors' electronic disclosure practices with regard

222. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.24(d) cmt. 4 (2001)).

223. 72 Fed. Reg. 21,141 (2007) (revising Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.24(b) cmt. 6 (2001)).

224. 12 C.F.R. § 226.31(b)(1). (2001).

225. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.31(b)(1) (2001)).

226. 72 Fed. Reg. 21,141 (2007) (revising 12 C.F.R. § 226.36 (2001) and Official Staff Comment, 12 C.F.R. pt. 226, supp. I, § 226.36 (2001)).

to the ability of consumers to retain Regulation Z disclosures and will consider further regulatory action if it appears necessary.[227]

[3] Selected TIL Act Caselaw

[a] When Does a New Commentary Apply to Old Facts?

Ree Clay and Ruby Chivers executed three retail installment contracts and a mortgage to finance the purchase of home improvements from Davenport Construction Company. Davenport assigned the contracts to Iver Johnson. Each of the retail installment contracts contained a Disclosure Statement as required under the TIL Act. One of the disclosures required by the TIL Act is the debtor's payment schedule, which includes the date on which the debtor must begin making payments.[228] In this case, the contracts provided that the monthly payments would begin thirty days from completion of the construction work. As the time for completing the construction work approached, the parties were able to determine the stated date of the monthly payments more precisely, so they typed the specific date on which the debtor's first payment was due onto the contracts. After the work was complete, Clay and Chivers defaulted on the contracts and attempted to rescind the transaction on grounds the creditors failed to properly disclose the payment schedule under the TIL Act.

The U.S. District Court for the Northern District of Illinois granted summary judgment to Clay and Chivers and held that the TIL Act requires creditors to provide an exact date on which the debtors payments will be due or to provide an estimate of the due date if they cannot determine a precise calendar date.[229] The district court denied the creditors' motion for reconsideration, which was based on a new comment 18(g)-4 to Regulation Z.[230] The creditors argued that comment 18(g)-4 specifically states that a creditor can satisfy the TIL Act by defining the beginning payment date by reference to the occurrence of a particular event rather than by disclosing a precise calendar date. The district court rejected the creditors' argument because comment 18(g)-4 had not been issued at the time the creditors had made their disclosures to the debtors and because the court did not believe the comment could be applied retroactively to validate the creditors' disclosure in this case.[231]

227. 72 Fed. Reg. 21,141, 21,149 (2007).

228. *See* 12 C.F.R. § 226.18(g) (2001).

229. Clay v. Johnson, 22 F. Supp. 2d 832 (N.D. Ill. 1998). Following a bench trial on the issue of damages, the court awarded the plaintiffs statutory damages and attorneys fees, and allowed recission. 77 F. Supp. 2d 879 (1999).

230. 50 F. Supp. 2d 816 (N.D. Ill. 1999).

231. *Id.* at 820-21.

The U.S. Court of Appeals for the Seventh Circuit reversed the judgment of the district court and found that, even though a proposed form of the Comment required payments to begin on a specific date, the final comment was a clarification of the rule permitting a creditor to refer to a date set with reference to a future event.[232] As a result, the Court of Appeals concluded that the payment schedule disclosure complied with the TIL Act.

The Court of Appeals also noted that the Board indicated an intention that the final version of comment 18(g)-4 interpret and clarify a creditors' existing obligations under the TIL Act and Regulation Z.[233] The court then noted:

> If an agency promulgates a new rule that changes the substantive state of existing law, that rule is not retroactive unless Congress expressly authorized retroactive rulemaking and the agency clearly intended the rule to be retroactive.[234]

However, the Court of Appeals stated that a new Board Commentary provision that clarifies an unsettled or confusing area of the law without changing the law can be applied retroactively.[235]

[b] When Does a Mortgage Rider Create a Personal Property Security Interest?

Teofilo Leon obtained a mortgage loan from Washington Mutual Bank to finance the purchase of his home. In connection with the transaction, Leon signed and received a copy of: a note, a mortgage, a one-to-four Family Rider Assignment of Rents, a Truth in Lending Statement and an Owner Occupancy Agreement. Under the Rider, the borrower granted a security interest in additional property, such as building materials, appliances and goods of every nature found in, on or used in connection with the property. Items specifically mentioned included, among others, refrigerators, dishwashers, ranges, stoves and fire extinguishers. The TIL Act disclosure, which was based on a Board model form, stated that Leon gave Washington Mutual a security interest in the goods or property being purchased. This covered the new home purchase. When Leon later brought suit against the bank, he argued that the TIL Act disclosure was inadequate because it failed to reflect the extensive security interest that the Rider created in Leon's personal property.[236]

Leon contended that the language in the Rider created a security interest beyond the real property and its fixtures, and that this violated the TIL Act and Regulation Z. The District Court for the Northern District of Illinois identified the central issue as whether the Rider created a security interest or an incidental

232. Clay v. Johnson, 264 F.3d 744 (7th Cir. 2001).
233. *Id.* at 749-51.
234. *Id.* at 749.
235. *Id.*
236. Leon v. Washington Mut. Bank, F.A., 164 F. Supp. 2d 1034, 1036 (N.D. Ill. 2001).

interest in the personal property, as defined by the TIL Act and Regulation Z.[237] After examining the Rider the court noted that the rider created a security interest in the consumer's personal property that extended beyond incidental interests to the real property.[238] Therefore, the court could not conclude as a matter of law that Washington Mutual complied with TIL Act.[239]

[c] Rescission Period Cannot Extend Beyond Three Years

On February 1, 1990, Gerald Garrett obtained a home improvement loan secured by a second mortgage on his residence. Don Akers, a mortgage broker, assisted Garrett in obtaining the loan. Garrett executed various documents, including an acknowledgment of receiving a notice of the right to rescind. The notice of right to rescind provided that rescission had to be in writing and made by February 5, 1990. Garrett suffered from severe dyslexia and had difficulty reading and understanding what he read; however, he never told Baggarly, the closing attorney, or Akers about his condition or asked them to read the documents to him or explain the documents.

Garrett attempted to make an oral rescission by telephone on February 5th. The loan was assigned to Fleet Finance, Inc. on February 6, 1990. On February 5, 7 and 8, Akers contacted Garrett to ask him to pick up the loan proceeds. In each instance, Garrett verbally indicated that he did not want the loan. On February 7, 1990, an escrow account check was made payable to Gerald Garrett, and on February 9, Baggarly allowed Frances Garrett, Gerald Garrett's ex-wife, to forge Garrett's name to a modification agreement to the loan. Baggarly notarized Frances's signature on the modification agreement as Gerald's and gave Frances the check, although there was no oral or written authorization by Gerald Garrett for his ex-wife to receive the check. Frances Garrett then forged Gerald Garrett's name to the check and deposited the check in the savings account of her mother, Myrtle Manas.

Gerald Garrett learned that Frances Garrett had received the check on February 20, 1990; Gerald did nothing until October 31, 1994, when he sued Fleet Finance, Akers, Baggarly, Frances Garrett and Myrtle Manas for fraud and to set aside the deed that secured the debt. Garrett argued that, because the transaction was tainted with fraud, the running of the statute of limitations was tolled under *Beach v. Ocwen Federal Bank,*[240] and he should be able to rescind the loan.

The Georgia Court of Appeals held that Garrett's right to rescind the loan was time-barred by the TIL Act.[241] The Court explained that, under the TIL

237. *Id.* at 1036-40.
238. *Id.* at 1039.
239. *Id.* at 1040.
240. 523 U.S. 410 (1998).
241. Garrett v. Fleet Finance, Inc. of Georgia, 556 S.E.2d 140 (Ga. App. 2001).

Act, any deed to secure debt or mortgage had to be rescinded in writing within three days and that any claim based upon rescission under TIL Act is extinguished three years after the closing of the loan.[242] The Court quoted extensively from *Beach* to support its conclusion that section 1635(f) of the TIL Act governs the underlying right and not just the time for bringing a suit.[243]

[d] Over-the-Limit Charge

In *Pfennig v. Household Credit Services, Inc.,*[244] a consumer credit card debtor sought to recover for the card issuer's failure to disclose (as a finance charge on the debtor's monthly statement) the fee charged to the debtor for exceeding the credit limit on her card. The Sixth Circuit U.S. Court of Appeals concluded that this was a fee charged as an incident to the extension of credit and therefore was a finance charge under 15 U.S.C. section 1605(a), subject to the TIL disclosure requirements.[245] The court rejected a specific provision in Regulation Z to the contrary at 12 C.F.R. section 226.4(c)(2), but held that the creditor was immune from civil liability for its TIL violation by reason of reliance on the Board's Regulation Z, pursuant to 15 U.S.C. 1640(f).[246]

The U.S. Supreme Court affirmed in part, reversed in part, and remanded. Writing for a unanimous court, Justice Thomas held that the TIL Act definition of "finance charge" is ambiguous in this context (as to overlimit charges), and the Board's Regulation Z interpretation (excluding overlimit fees from the finance charge) was not arbitrary, capricious, or manifestly contrary to the statute.

[e] Attorney Is Not a Creditor

Under *Riethman v. Berry,*[247] an attorney does not become a creditor under the TIL Act merely by performing legal services without requiring immediate payment. Where the engagement plainly manifested the attorney's right to prompt

242. *Id.* at 143.

243. *Id.* at 143-44. *See also* Bolden v. Aames Funding Corp., 2005 WL 948592 (W.D. Tenn. 2005) (equitable tolling does not apply to a rescission claim; the right is completely extinguished at the end of the three-year period).

An interesting rescission case is Hamm v. Ameriquest Mortgage Company, 2005 WL 2405804 (N.D. Ill. 2005). There the lender, in addition to the notice of right to cancel required by law, supplied a separate document granting seven days to cancel. The consumer argued that this was confusing and a violation; the court rejected the argument. The court in Jones v. Ameriquest Mortgage Company, 2006 WL 273545 (N.D. III. 2006), disagreed. This clearly shows the unfortunate fact that TIL tends to dampen variation and increases the risk that creditors take in offering products that venture outside of the ordinary. For other rescission cases, *see* the discussion *supra* at ¶1.01[2], and *infra* Chapter 8.

244. 295 F.3d 522 (6th Cir. 2002), *reversed,* 124 S. Ct. 1741 (2004).

245. *Id.* at 529-531.

246. *Id.* at 533-534.

247. 287 F.3d 274 (3d Cir. 2002).

payment, a failure to pursue tardy clients did not constitute a deferral of payment sufficient to constitute a credit transaction covered by the TIL Act.[248]

[f] Check-in-the-Mail Loan Program

In *Parrish v. Blazer Financial Services, Inc.,*[249] A. L. Parrish alleged that the Blazer Financial Services (Blazer) "check-in-the-mail" lending program violated the TIL Act[250] because the loan agreement did not disclose the date of the loan or when the payments on the loan were due. The trial court certified the class action claims, but then entered summary judgment for Blazer and decertified the class. Parrish appealed to the Alabama Supreme Court.

Under the check-in-the-mail program, Blazer and Great Western Financial Corporation mailed loan solicitations to some of their customers. Customers included on the check-in-the-mail program mailing list would receive a solicitation letter from Blazer and at the bottom of the letter a detachable check. The letter instructed the recipient to read the text printed on the reverse side of the letter under the heading "Loan Agreement and Federal Disclosure Statement."

When a customer cashed or deposited one of these checks, a Blazer representative contacted the customer to confirm the loan and notified the customer of the date that the check cleared Blazer's bank. Additionally, within thirty days of the date the check was cashed or deposited, Blazer mailed the customer a follow-up TIL disclosure form and a payment book that specified the starting date and payments of the loan.

Parrish claimed that the check-in-the-mail program violated the TIL Act because the loan agreement, the only loan document in the hands of the customer after the customer cashed the check attached to the solicitation letter, did not disclose the date of the loan or when the payments on the loan were due. The Alabama Supreme Court noted in *Parrish* that the TIL Act requires the disclosure of "[t]he number, amount, and *due dates* or period of payments scheduled to repay the total of payments,"[251] and that Regulation Z[252] requires disclosure of the "timing of payments scheduled to repay the obligation."[253] The loan agreement provided that: "The DATE OF THE LOAN shall be and FINANCE CHARGES SHALL BEGIN TO ACCRUE [on the date the] check (Note) is paid by Creditor's bank. FIRST PAYMENT DUE DATE is one month after the Date of the Loan." Parrish argued that the TIL Act requires the disclosure to provide the exact date the loan commenced and to specifically state the dates the first and subsequent payments are due.

248. *Id.* at 278. For discussion of who is a creditor under TIL Act, *see infra* Chapter 2, ¶ 2.02.
249. 868 So. 2d 406 (S. Ct. Ala. 2003).
250. 15 U.S.C. §§ 1601-1667e.
251. 15 U.S.C. § 1638(a)(6) (emphasis added).
252. 12 C.F.R. Pt. 226.
253. 12 C.F.R. § 226.18(g). *See generally* primary text at ¶ 5.05[7].

Blazer explained that it would not be possible to give a specific payment due date in the check-in-the-mail loan agreement because Blazer could not be certain when a customer would cash the check. Blazer argued that Regulation Z section 226.17(g) allows for "delayed disclosure" of the date of the loan in situations where the loan is commenced without a direct, "face-to-face" solicitation. The Alabama Supreme Court concluded that under section 226.17(g) and the Board's interpretations of Regulation Z, Blazer's delayed disclosure of the specific date of the commencement of the loan (*i.e.,* as determined when the check is paid by Blazer's bank) was proper.

Parrish also argued that Blazer violated Regulation Z sections 226.17(a)(2) and 226.17(c)(1) because Parrish did not receive a duplicate copy of his signed promissory note (included on the signed check that Parrish cashed). The court concluded that sections 226.17(a)(1) and 226.17(c)(1) only require a creditor to provide a borrower with a copy of the terms of the legal obligation between the parties. The court examined the documentation Blazer gave Parrish and concluded that Blazer had complied with the TIL Act. As a result, the court affirmed the summary judgment in favor of Blazer, and held that the loan agreement satisfied the TIL Act disclosure requirements with respect to the number, amount, and due dates for payment. The court also concluded that Blazer complied with the TIL Act requirement that the creditor provide Parrish with a copy of the terms of the legal obligation between the parties.[254]

[g] TIL Litigation Affecting Vehicle Finance

[i] Cash Rebate Not a Hidden Finance Charge. Malinee and Ritnarone Virachack (the Virachacks) entered into a retail installment contract for the

254. *Parrish,* 868 So. 2d 406. In Porter v. Nationscredit Consumer Discount Co., 2005 WL 1819974 (E.D. Pa. 2005), the consumer argued that the creditor's failure to supply a signed copy of the request for credit insurance was a violation. The court said the law requires an affirmative written request made after the required disclosures and does not require a signed copy of a consumer's written request for insurance.

Other cases litigated whether the consumer had received the required disclosures. According to Stutzka v. McCarville, 420 F.3d 757 (8th Cir. 2005), the testimony of the closing agent on a loan created a rebuttable presumption that proper disclosures had been delivered but that the presumption was rebutted by the consumer's affidavit to the contrary as well as the similar testimony of the consumer's record keeper. The court in Strang v. Wells Fargo Bank, N.A., 2005 WL 1655886 (E.D. Pa. 2005) found that a signed acknowledgment of the receipt of disclosures created a rebuttable presumption and the borrower's testimony alone was insufficient to rebut the presumption. The court reached the same conclusion in Hershey v. Deutsche Bank Nat. Trust Co., 2005 WL 1420813 (D. Minn. 2005); however, the court in Hammox v. Heartland Home Finance, Inc., 2005 WL 1130347 (E.D. Tenn. 2005) refused summary judgment on the basis of the presumption. And in Mear v. West Loop Automotive Ltd., 2005 WL 543987 (Tex. App. 2005), where the consumer argued she did not receive the required disclosures until two weeks later, and the signed contract acknowledged receipt at consummation, the court held that the parol evidence rule precluded contradiction of the terms of the written contract.

Finally, the court in Randolph v. Joe Holland Chevrolet, Inc., 2005 WL 2428164 (S.D.W. Va. 2005), in accord with Official Staff Commentary to Regulation Z, held that a creditor satisfies the disclosure requirement when the creditor gives the consumer a multiple copy form containing the credit agreement and disclosures, the consumer reviews and signs the form and returns it to the creditor, who separates the copies and gives one to the consumer to keep, even if this is immediately before the contract is signed.

purchase of a new Ford Explorer from University Ford for a stated price of about $20,000 at a stated APR of 0.9 percent. In order to receive the promotional 0.9 percent APR, the Virachacks were required to agree to the assignment of the contract to Ford Motor Credit Company (FMCC). At the time the contract was signed, the Virachacks and the dealer intended that the contract would be assigned to FMCC. University Ford did not tell the Virachacks that they would have received a $2,000 rebate from Ford if they had paid cash for the vehicle. They could not receive both the rebate and the promotional APR, but they could have received the rebate without the promotional APR had they financed the vehicle elsewhere.

The Virachacks argued that the foregone rebate was a finance charge. After reviewing the Regulation Z definitions, and the decision of the Seventh Circuit U.S. Court of Appeals on "hidden finance charges" in *Walker v. Wallace Auto Sales, Inc.,*[255] the U.S. District Court for the Southern District of California rejected the Virachacks' argument. The court reasoned that the forgone rebate was not withheld "incident to or as a condition of credit" and that the promotional rate was "simply a different form of the cash rebate in that both the rebate and the interest rate are forms of subsidizing the market price of the vehicle offered to consumers in order to generate sales."[256]

[ii] Another Cash Rebate Case. Albano Coelho sued Park Ridge Oldsmobile, Inc. (Park Ridge), alleging a violation of the TIL Act. When the Mitsubishi Montero Sport vehicle was purchased, Coelho elected to receive a promotional finance rate of 4.52 percent, available if the contract was subsequently assigned to Mitsubishi Motors Credit of America. Consequently, Coelho was not entitled to an alternative $1,500 rebate from the manufacturer, Mitsubishi Motor Sales of America. As in *Virachack,* the plaintiff theorized that the $1,500 rebate that was not received should have been disclosed as a "finance charge." The U.S. District Court for the Northern District of Illinois disagreed and granted summary judgment for Park Ridge. The court explained that Coelho "was not 'denied' the rebate because he chose to finance his purchase. [The buyer] was ineligible for the rebate because he took advantage of the promotional 4.52 percent APR rather than the standard 8.95 [percent] APR." The court also noted that the rebate comes from the manufacturer and the manufacturer sets the eligibility rules, not the dealer.[257]

[iii] Failure to Find Financing Does Not Render TILA Disclosures Inaccurate. Crystal Scroggins brought TIL Act claims against LTD, Inc. d/b/a Lustine Toyota Dodge (Lustine), claiming that Lustine (an auto dealer) violated the TIL Act by failing to provide financing on the terms promised in the retail

255. 155 F.3d 927, 929-930 (7th Cir. 1998).

256. Virachack v. University Ford, 259 F. Supp. 2d 1089 (S.D. Cal. 2003), *aff'd,* 410 F.3d 579 (9th Cir. 2005), *cert. denied,* 126 S. Ct. 1053 (2006).

257. Coelho v. Park Ridge Oldsmobile, Inc., 247 F. Supp. 2d 1004 (N.D. Ill. 2003).

installment sales contract and by failing to pay the license and registration fees listed in the contract. Lustine "spot-delivered" the vehicle, making the credit and sales contract contingent upon Lustine's ability to sell the contract to an assignee. Scroggins had possession of the vehicle for approximately three months while Lustine tried to sell the contract. During this time, Lustine issued Scroggins three consecutive sets of thirty-day temporary registration plates for the vehicle. Ultimately, Lustine advised Scroggins that it could not sell the contract on acceptable terms and asked Scroggins to return the vehicle, which she did. However, Lustine also had to advise Scroggins that it had already sold her trade-in vehicle at an auction, during the interim three months.

In its decision, the U.S. District Court for the Eastern District of Virginia addressed only the TIL Act claims. The court observed that the purchase transaction was never consummated, even though Scroggins claimed that she was told it was a "done deal." However, the court concluded that even if the purchase had been consummated, Scroggins failed to allege that the TIL Act disclosures were inaccurate at the time they were provided. Instead, the court noted, Scroggins claimed that subsequent events rendered the disclosures inaccurate. Any inaccuracies in the TIL disclosures caused by a subsequent event do not constitute a violation of the TIL Act. The same reasoning applied to Lustine's failure to pay the state department of motor vehicles fees collected from Scroggins. Thus, the court concluded that Scroggins failed to state a claim under the TIL Act.[258]

[iv] Class Action on Consummation and TIL Act Disclosures. Two plaintiffs brought a putative class action against Bill Heard Chevrolet, Inc.-Plant City (Bill Heard), alleging violations of Florida law and the TIL Act. Bill Heard moved to dismiss the TIL Act claim, arguing that the plaintiffs never consummated a transaction with the Bill Heard dealership in which a TIL Act violation occurred. One plaintiff conceded that he returned the vehicle he had attempted to purchase and received return of his down payment and trade-in from the dealer. The other plaintiff conceded that there was no TIL Act violation in his final retail installment contract. The plaintiffs, however, argued that Bill Heard was liable for TIL violations in the initial, unfunded retail installment contracts. The U.S. District Court for the Middle District of Florida ruled in favor of Bill Heard and dismissed the TIL claims with prejudice. The court also declined to exercise supplemental jurisdiction over the state law claims and dismissed those claims. In its decision, the court also denied the plaintiffs' motion for a rehearing, explaining its reasoning for dismissal of the TIL Act claim.

The *Bill Heard* court concluded that, as a matter of Florida law, no transaction in which a TIL Act violation occurred was ever consummated. The court stated: "Bill Heard had no obligation to provide [TIL Act] disclosures prior to obtaining financing approval." It then went on to explain that the TIL Act

258. Scroggins v. LTD, Inc., 251 F. Supp. 2d 1277 (E.D. Va. 2003).

requires certain disclosures "before credit is extended" and that Regulation Z interprets the phrase "before credit is extended" to mean prior to consummation of the transaction. "The official commentary on the definition of consummation indicates," the court continued, "that state law, not Regulation Z, determines when a consumer becomes contractually obligated." The court then indicated that "spot-delivery" contract clauses—like the one in this case—have been construed under Florida contract law to create a condition precedent to contract formation.[259] Since much of the case law relied on by the plaintiffs involved spot-delivery scenarios set up with financing as a condition subsequent rather than a condition precedent to contract formation, the *Bill Heard* court found that those cases did not change its analysis: Any TIL Act violations in the plaintiffs' unfunded contracts were not actionable, since those contracts were never consummated under Florida law because the condition precedent to contract formation—approval of financing—never came about.

The *Bill Heard* court also addressed the plaintiffs' argument that the court's ruling makes the TIL Act disclosures that were provided by the dealer mere "estimates." The court responded: "Buyers and car dealers are not prohibited under [the TIL Act] from backdating a contract."[260] The court went on to state that flexible transactional arrangements (such as backdating, and "spot-delivery") "provide benefits and value to consumers."[261] In exchange for use of the vehicle without paying any rental fee under the bailment agreement, the court said, the plaintiff agreed to allow the dealer to backdate the final contract. The court stated: "[The] TIL Act does not prohibit, restrict, or otherwise control the parties' right to freedom of contract."[262]

[v] *Rucker v. Sheehy Alexandria, Inc.*[263] In its *Rucker* opinion, the U.S. District Court for the Eastern District of Virginia ruled on what it regarded as a "novel question" under the TIL Act. In *Rucker,* the first retail installment contract signed by the buyer in the retail installment sale and spot-delivery of the vehicle was conditioned on certain financing. When that financing fell through, the buyer signed a second contract approximately ten days later. The dealer backdated the second contract to the date of the first contract. The question addressed by the court was "whether the disclosures in the second agreement violate[d] the Truth in Lending Act . . . by calculating the annual percentage rate of interest . . . on the basis of the date on the backdated agree-

259. No specific contract language was quoted in the opinion; presumably, the dealer's spot delivery documents made financing a condition precedent to contract formation, whereas some contracts make it a condition subsequent, in which case the contract language also typically will allow the vehicle dealer to rescind the deal if the condition is not met.

260. Note that at least one other court has analyzed that issue and concluded the contrary. *See* Rucker v. Sheehy Alexandria, Inc., 228 F. Supp. 2d 711 (E.D. Va. 2002), *reaffirmed on reconsideration,* Rucker v. Sheehy Alexandria, Inc., 244 F. Supp. 2d 618 (E.D. Va. 2003), discussed below.

261. *E.g.,* the ability to drive away in a vehicle and attain its use even if the financing arrangements cannot then be finalized.

262. Bragg v. Bill Heard Chevrolet, Inc.-Plant City, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003).

263. *See supra* note 265.

ment rather than the date the transaction was consummated." The court ruled that the defendant auto dealer had violated the TIL Act.

By its terms, the first retail installment contract became void when the dealer was unable to sell the contract to an assignee on the terms reflected in the agreement within five days. The *Rucker* court noted the dealer's point that "it is industry practice for car dealers to use the date of delivery of the vehicle on subsequent agreements reached in spot delivery transactions, and banks will only accept buyer's orders containing the date of delivery of the vehicle." But the court responded: "According to Regulation Z, consummation occurs not when the consumer takes possession of the product, but at the 'time that a consumer becomes contractually obligated on a credit transaction.'" Under this standard, although the required TIL Act disclosures were timely, the court found that they were inaccurate. The APR figure on the second agreement was inaccurate because "Regulation Z does not permit calculation of the APR based on an interest accrual date which is earlier than the consummation date."[264]

In its argument to the court to amend or alter the judgment, the dealer argued that the second contract "related back" to an "effective date" of the vehicle delivery, by agreement of the parties, and this relation-back made the disclosed APR accurate. On reconsideration the court once again disagreed, again concluding that the date of consummation was the date of the second contract. The court said the dealer's request for reconsideration of the issue was "inappropriate and without merit."[265]

[vi] More Trouble with Consummation. Bradley Nigh, a disgruntled car buyer, sued Koons Buick Pontiac GMC, Inc. (Koons or the dealer), the dealership where Nigh purchased a 1997 Chevy Blazer. Nigh signed three different retail installment contracts before the transaction was finally completed. He had attempted to get out of the deal and obtain the return of his trade-in vehicle at the time the dealer asked him to sign the second contract, but the dealer told him that the trade-in vehicle had been sold already. This was not true. The trade-in vehicle was later repossessed from the dealer's lot because Nigh had stopped making payments on it to a previous creditor.

When Nigh learned of the repossession, he returned the Blazer to Koons and attempted to rescind the transaction. He then brought suit against the dealer, alleging various state and federal law claims. The U.S. District Court for

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264. *Rucker,* 228 F. Supp. 2d at 717. *Compare* Liabo v. Wayzata Nissan, LLC, 707 N.W.2d 715 (Minn. App. 2006) (where purchase of a car was conditioned on the buyer's approval for special rate financing, the buyer was not obligated to purchase the vehicle and thus the seller's obligation was not triggered to make disclosure) *with* Gibson v. LTD, Inc., 434 F.3d 275 (4th Cir. 2006) (consummation occurred when retail installment sales contract was signed even though conditioned on the dealer securing financing where the condition was in the dealer's control and the borrower could not alter the terms and could not revoke if the dealer found an "acceptable" third party lender for the borrower in the truck purchase).

A somewhat similar case in the real estate loan area is O'Brien v. Aames Funding Corp., 374 F. Supp.2d 764 (D. Minn. 2005), also dealing with two loan transactions, a condition to the loan, and the question of consummation.

265. Rucker v. Sheehy Alexandria, Inc., 244 F. Supp. 2d 618 (E.D. Va. 2003).

the Eastern District of Virginia granted summary judgment on some of the claims and counterclaims, but some claims went to trial. A jury awarded Nigh $24,192 in damages under the TIL Act, on his claim that Koons intentionally included a charge for a Silencer alarm system which Nigh did not receive, and $4,000 in damages under the Virginia Consumer Protection Act on Nigh's claim that Koons violated the Virginia Act by telling Nigh that Koons did not retain possession of the Blazer, in order to induce him to sign the third retail installment contract. Koons appealed and Nigh cross-appealed some of the trial court's rulings. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's judgment.[266]

On appeal to the Fourth Circuit U.S. Court of Appeals, Koons argued that the trial court erred in not granting summary judgment on Nigh's claim that the second retail installment sales agreement violated the TIL Act in several respects. Koons theorized that the contract was never countersigned and never funded, so the contract was never consummated and there were "no credit terms against which to assess a disclosure's accuracy." The Fourth Circuit framed the issue as "what consummation of a credit transaction . . . encompasses." The Fourth Circuit concluded that consummation under the TIL Act, 15 U.S.C. section 1638, "encompasses unfunded, financing agreement options to which consumers contractually commit, and under which they can be bound at the lender's sole discretion." Thus, the Fourth Circuit said, the district court appropriately concluded that liability attached when Nigh "committed himself to the purchase on credit."[267]

The Fourth Circuit also rejected Koons' arguments respecting the Silencer line item in the second retail installment contract, finding that the dealer's admission that the charge was a "mistake" necessarily implied that the second retail installment agreement was inaccurate. The Fourth Circuit also found that the trial evidence supported the jury's verdict on this issue.

Probably the most important issue addressed by the Fourth Circuit was Koons' challenge to the trial court's application of the TIL Act's statutory damages cap in 15 U.S.C. section 1640(a)(2)(A)(i).[268] The trial court declined to apply the cap and allowed a statutory damages award of twice the finance charge in connection with the transaction. The Fourth Circuit affirmed the trial court's decision on this issue, after analyzing the effect of the Truth in Lending Act Amendments of 1995 on section 1640(a)(2)(A). The Fourth Circuit rejected Koons' remaining arguments and Nigh's cross-appeal as well.[269]

On January 20, 2004, the U.S. Supreme Court granted certiorari on the statutory damages issue.[270] The narrow question was whether statutory damages

266. Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003), *cert. granted,* 124 S. Ct. 1144 (2004). *See also infra* this supplement ¶ 12.04[2].
267. *Nigh,* 319 F.3d at 124.
268. TIL Act § 130(a)(2)(A)(i).
269. *Id.,* at 129.
270. *Id. Cf.* Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943 (7th Cir. 1997).

under section 1640(a)(2)(A)(i) are limited to $1,000, or can be twice the finance charge. The answer depended on whether Congress, perhaps inadvertently, removed the cap in the 1995 TIL Act Amendments. The Fourth Circuit panel in *Nigh* was split on this issue and the judges confessed that they "do not know what Congress intended."[271] The Supreme Court reversed the Fourth Circuit and said the $1,000 statutory limitation should have been applied. The case was remanded back to the district court. That court subsequently considered the effect of the reduction on the award of attorneys' fees and costs; *see Nigh v. Koons Buick Pontiac GMC, Inc.*, 384 F. Supp. 2d 915 (E.D. Va. 2005), *aff'd in part and vacated in part,* 478 F.3d 183 (4th Cir. 2007).

[vii] Dealer's Participation in Finance Charge Not an Unfair Practice. In an important California appellate court decision, the court made clear that automobile sales finance companies and other assignees, that purchase motor vehicle retail installment sale contracts from vehicle dealers, do not thereby make a loan to the consumer buyer of the vehicle, and that the payment of finance charge-based compensation (*e.g.,* an "APR split") to the dealer does not amount to an unfair practice or unfair competition.[272]

With rare exceptions not relevant to this discussion, auto dealers are not engaged in the business of extending loans, but rather sell vehicles on credit. During the period of time between the date of the retail installment sale transaction, for the sale of the vehicle between the dealer and the vehicle buyer, and the date on which the dealer can sell that contract to an assignee (a contract purchaser), the dealer is the sole creditor and owner of the contract. To facilitate the later sale of such contracts, dealers often enter into business relations with one or more potential contract purchasers, anticipating possible sales of these credit contracts to contract purchasers in subsequent transactions. In many instances, these arrangements also provide that the dealer will retain, as compensation for having originated the credit contract which is being sold to the contract purchaser, part of the finance charge called for in the contract, typically calculated as part of the difference between the retail contract APR and the contract purchaser's wholesale "buy rate."[273] This difference is sometimes referred to as a "dealer reserve," "dealer participation," or "APR split."[274]

In *Kunert,* which disposed of several cases originally filed as class actions in Los Angeles County Superior Court, the plaintiffs argued that a variety of unlawful actions resulted from such arrangements:

271. *Nigh,* 319 F.3d at 128.

272. Kunert v. Mission Financial Services Corporation, 110 Cal. App. 4th 242, 1 Cal. Rptr. 3d 589 (2d Dist. 2003).

273. The contract rate reflects the retail price of credit. The secondary-market "buy rate" is the wholesale equivalent. The difference reflects the cost and value of a retail origination.

274. *See, e.g.,* Eugene J. Kelley, Jr., John L. Ropiequet, and Anna-Katrina S. Christakis, *APR Splits: Still Legal After All These Years,* 56 Consumer Fin. L.Q. Rep. 296 (2002).

- that a dealer reserve or dealer participation is prohibited as an unlawful commission under the "seller assisted loan" provisions of the California Rees-Levering Automobile Sales Finance Act (the Rees-Levering Act);[275]
- that the dealer reserve or dealer participation is a "secret payment" injurious to competition that violates California's Unfair Practices Act;[276] and
- that such payments to dealers are unlawful, unfair, and fraudulent business practices under the California unfair competition law.[277]

After preliminary rulings on various conspiracy and misjoinder claims, the trial court was left with a series of similar representative actions against various individual lenders. The trial court sustained the defendants' demurrers without leave to amend and notices of appeal were filed from the judgments dismissing three of the cases. The three cases were consolidated in *Kunert* for purposes of appellate review.

On appeal, the *Kunert* court first reviewed the differences between a conditional sale contract and a loan of money, noting that a credit sale does not involve a loan of money. "Consumer laws such as Rees-Levering, which among other things set limitations upon finance charges, 'constitute . . . a recognition that, whatever the rational weaknesses of the distinction on which it is based, practical considerations of significant moment justify the regulation of credit sales by a means more flexible than that provided by the usury laws.' "[278]

Although a direct loan made by a lender, independent of the dealer's involvement, is not subject to the Rees-Levering Act, a loan that is obtained for a buyer with the assistance of the dealer *is* subject to the Rees-Levering Act, and it was on this basis that the plaintiffs in *Kunert* tried to make a claim. California Civil Code section 2982.5 provides that the seller may assist the buyer in obtaining a loan to pay for part or all of the purchase price, or a "side loan" to pay for part or all of the down payment, or any other payment in a sales transaction, but the seller may not provide any security or guarantee any payment on the loan, and may not receive any commission or other remuneration for assisting the buyer if the buyer is obligated to purchase the vehicle or receives possession of the vehicle before the loan is obtained. The plaintiffs in *Kunert* alleged that the practice of a secondary market contract purchaser paying compensation to the dealer in the form of a reserve, APR split, or participation, *i.e.*, an amount based on the finance charge that is the difference between the secondary market wholesale rate and the retail contract rate, is an unlawful business practice because it is an "improper commission or other remuneration." The plaintiffs also alleged the "secret payment" of this amount was injurious to competition under California Business & Professions Code section 17045. Essential to all of these plaintiff theories was the assertion that the secondary

275. *Kunert*, 110 Cal. App. 4th at 249.
276. Business & Professions Code § 17045.
277. Business & Professions Code § 17200.
278. Quoting Boerner v. Colwell Co., 577 P.2d 200 (Cal. 1978).

market creditor who subsequently purchased the credit contract from the dealer was actually making a direct loan to the consumer, with the assistance of the dealer.

The *Kunert* court noted that the conditional sale contract entered into by the vehicle buyers was a separate transaction, a credit sale of the vehicle by the dealer for the contract price, and this was followed by a second, subsequent transaction when the vehicle buyer's credit contract was sold by the dealer to a contract purchaser. The court clearly rejected the argument that the secondary market sale of the contract was a loan for the purchase price of the vehicle structured to avoid the application of the seller-assisted loan provisions. Legal precedent (including *Boerner*[279]) demonstrates clearly that a conditional sale contract evidences a bona fide credit sale, not a loan. The fact that the conditional sale contract was later sold by the dealer to a contract purchaser, and the payment of compensation to the dealer for the origination and sale of the contract (however that compensation is labeled), did not turn the sale of the contract into a loan. Without a loan, there could be no lending violation. Without a violation, there could be no unfair practice involved. Finally, the "secret payments" allegation based on section 17045 applies not to a contract purchaser, but to "rebates, refunds, commissions or unearned discounts" paid to some retail buyers but not others, resulting in unfair competition. The court also rejected the argument that the payment of compensation to a dealer who originates a credit contract offends an established public policy, or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers:

> The claim that consumers pay higher interest rates than they would if no dealer commission existed may be true, but that is scarcely unfair. Dealers, like any other retailer, seek a profit on the credit services they provide. We are compelled to agree with [the contract purchaser] that the 'unfair' prong of the unfair competition law was not intended to eliminate retailers' profits by requiring them to sell at their cost, whether the product is automobiles or automobile financing. In short, we discern no offense to public policy, and no unfairness to be weighed.[280]

The issue of an "APR split" or "yield spread premium" has been extensively litigated and the courts uniformly hold the split need not be disclosed under the TIL Act. *See, e.g., Guinn v. Hoskins Chevrolet*, 836 N.E.2d 681 (Ill. App. 2005); *Ford Motor Credit Co. v. Majors*, 57 UCC Rep.Serv.2d 491 (Minn. App. 2005); *Strang v. Wells Fargo Bank, N.A.*, 2005 WL 1655886 (E.D. Pa. 2005); *Stump v. WMC Mortgage Corp.*, 2005 WL 645238 (E.D. Pa. 2005) (in the context of a real estate loan, but in that context the Real Estate Settlement Procedures Act may require disclosure); *see also infra* ¶ 12.06.

279. *Id.*

280. *Kunert, id. See generally* Alvin C. Harrell, Case Note: *Judge Understands Indirect Auto Finance, Part Two,* 57 Consumer Fin. L.Q. Rep. 231 (2003).

[viii] Other Vehicle Finance Litigation. *Slover-Becker v. Pitre Chrysler Plymouth Jeep of Scottsdale, Inc.*, 409 F. Supp. 2d 1158 (D. Ariz. 2005), involved how to disclose the negative value on a vehicle traded in. The court allowed the dealer's disclosure which disclosed the cash down payment as the down payment and the sales price as increased by the amount of negative equity. A similar case is *Hart v. V.B. Investments, Inc.*, 2005 WL 1668540 (M.D. Fla. 2005).[281] *See also infra* ¶ 3.02[1] and [2].

It is difficult to see how these cases could have been correctly decided in light of the Official Staff Commentary expressly addressing negative equity. First, the comment to the definition of "down payment" provides that creditors may, at their option, disclose a cash payment as a credit toward negative equity (the trade-in vehicle is disclosed in the down payment section of the itemization of amount financed), with the resulting shortfall, if any, disclosed as an "amount paid to others," or they may treat the entire cash as a credit, in which case, the entire amount of the negative equity would be disclosed an "amount paid to

281. For a similar case where a court found that the practice of including a trade-in over-allowance in the vehicle cash price violated the California Automobile Sales Finance Act (ASFA) and its corresponding regulation, Regulation Z, *see* Thompson v. 10,000 RV Sales, Inc., 130 Cal.App.4th 950 (2005). Thompson signed a conditional sale contract to purchase a used motor home from 10,000 RV. Thompson required financing to purchase the motor home and as part of the sales transaction, agreed to trade in her old motor home, which was subject to an outstanding balance of $46,000. Although 10,000 RV appraised the trade-in at $30,000, it credited Thompson $54,000 on the trade-in, creating an "over-allowance" of $24,000. The over-allowance permitted Thompson to show on the face of the contract a positive net trade-in value of $8,000 ($54,000-$46,000 balance owed) to apply toward the downpayment of the used motor home. However, because Thompson owed $46,000 on her old motor home and 10,000 RV appraised it at $30,000, a negative equity of $16,000 existed. 10,000 RV explained that the purpose of including an over-allowance in the cash selling price was to eliminate the appearance of negative equity and increase the prospect of obtaining credit approval for the buyer. The over-allowance would not have been created for a cash buyer because a cash buyer would not need to obtain financing in a cash transaction. 10,000 RV did not disclose to Thompson that it had created the $24,000 over-allowance on her trade-in vehicle. Without Thompson's knowledge or consent, the $24,000 over-allowance was added to the $69,398 price of the used motor home that a cash purchaser would pay, to show a cash price of $93,398 on the financing contract. Thompson sued 10,000 RV, claiming that the value of her trade-in vehicle was inflated to hide the negative equity associated with the transaction, the negative equity was included in the cash price of the used motor home, there was no disclosure that the negative equity was included in the cash price and that 10,000 RV's standard practice was not to disclose inclusion of negative equity in the cash price on the financing contract.

The trial court ruled in favor of Thompson finding that 10,000 RV violated certain consumer protection statutes, including the California ASFA, the Consumers Legal Remedies Act, and California's Unfair Competition Law. 10,000 RV appealed, challenging the trial court's injunction that prohibited it from including a trade-in over allowance in the vehicle cash price on a financing contract. The California Court of Appeal relied on expert testimony, providing that the practice of including a trade-in over-allowance in the vehicle cash price violates the California ASFA and its corresponding federal regulation, Regulation Z, because the buyer is unaware that she is financing part of the existing obligation on the trade-in vehicle (i.e., the negative equity) in addition to a portion of the purchase price of the new vehicle. Accurate disclosure was also required because the cash price of the motor home affected sales tax and license and registration fees, which are computed on the cash price. The appellate court stated that to the extent the cash price for a financed purchase is inflated above the selling price in a comparable cash transaction, the difference is a finance charge, which must be properly disclosed. In Thompson's case, the cash price of the used motor home should have been $69,398 in both a cash and credit transaction. However, the cash price for the used motor home in Thomson's credit transaction was $93,398. The $24,000 difference that constituted a finance charge was not properly disclosed to Thompson as a finance charge, nor was the $16,000 properly disclosed as negative equity. Therefore, the appellate court found that 10,000 RV violated the California ASFA and other California consumer protection laws by inflating the cash price of the used motor home to include the trade-in over-allowance and hide the appearance of negative equity, without full and complete disclosure to its customer.

others" when the seller/creditor pays off the existing lien amount.[282] These alternative methods are referred to as the "netting" versus "non-netting" methods.

The Commentary also addresses the effect of existing liens in connection with the "total sale price."

> When a credit-sale transaction involves property that is being used as a trade-in (an automobile, for example) and that has a lien exceeding the value of the trade-in, the total sale price is affected by the amount of any cash provided. (See comment 2(a)(18)-3.) To illustrate, assume a consumer finances the purchase of an automobile with a cash price of $20,000. Another vehicle used as a trade-in has a value of $8,000, but has an existing lien of $10,000, leaving a $2,000 deficit that the consumer must finance.
>
> i. If the consumer pays $1,500 in cash, the creditor may apply the cash first to the lien, leaving a $500 deficit, and reflect a down payment of $0. The total sale price would include the $20,000 cash price, an additional $500 financed under section 226.18(b)(2), and the amount of the finance charge. Alternatively, the creditor may reflect a down payment of $1,500 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.
>
> ii. If the consumer pays $3,000 in cash, the creditor may apply the cash first to extinguish the lien and reflect the remainder as a down payment of $1,000. The total sale price would reflect the $20,000 cash price and the amount of the finance charge. (The cash payment extinguishes the trade-in deficit and no charges are added under section 226.18(b)(2).) Alternatively, the creditor may elect to reflect a down payment of $3,000 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.[283]

The Commentary does not discuss the ability of a creditor to include the amount of the negative equity in the total sale price, and this method has been determined to be improper.

The TIL Act requires that the total sale price be disclosed. In *Randle v. Glendale Nissan, Inc.*, 56 UCC Rep.Serv.2d 325 (N.D. Ill. 2005), the consumer argued that she was told the vehicle was priced at $15,995, but the combined sales contract and disclosure statement stated $21,995. The court held that the parol evidence rule barred allegations of prior oral agreements (but also refused to preclude Randall from showing the asserted $15,995 price).

282. *See* 12 C.F.R. § 226.2(a)(18)—3.ii.
283. 12 C.F.R. § 226.18(j)—3.

[h] HOEPA Loans

There has been a fair amount of litigation over the requirements of the Home Ownership and Equity Protection Act of 1994 (HOEPA).[284] HOEPA adopts some special rules for so-called high rate/high cost mortgages.[285] The application of the act is triggered if the rate or the points and fees charged exceed designated thresholds.[286] Most of the litigation has focused on how these amounts are to be calculated,[287] or on the base for calculation.[288]

284. *See supra* ¶ 1.02[4], and *infra* ¶ 6.09.

285. Excluded are residential mortgage transactions (essentially a purchase money mortgage; *see* 15 U.S.C. § 1602(w)); reverse mortgages; and transactions under an open-end credit plan (as to the latter, *see In re* Merriam, 333 B.R. 22 (Bankr. W.D.N.Y. 2005)).

286. *See In re* Robertson, 333 B.R. 894 (Bankr. M.D. Fla. 2005) (APR exceeded by more than 10 percentage points the yield on Treasury Securities); Booker v. Wells Fargo Home Mortgage, Inc. 138 Fed. Appx. 728 (6th Cir. 2005) (prepaid interest is excluded from the points and fees test); Short v. Wells Fargo Bank Minnesota, N.A., 401 F.Supp.2d 549 (S.D. W.Va. 2005) (fees paid to a mortgage broker, if the consumer bears the cost at the time of closing, whether the fees are financed, paid separately or deducted from the proceeds of the loan, are included in the calculation of fees and points); Morrison v. Brookstone Mortgage Co., Inc., 415 F.Supp.2d 801 (S.D. Ohio 2005) (net settlement charges, *e.g.*, total charges less any credits, are the calculation base for the rate to determine HOEPA applicability); *In re* Strong, 2005 WL 1463245 (E.D. Pa. 2005) (only an amount that exceeds what is determined to be a reasonable fee is to be included in the high cost calculation).

287. *Id.*

288. *See Morrison*, 415 F.Supp.2d 801, noted *supra* note 286, and Bynum v. Equitable Mortgage Group, 2005 WL 818619 (D.D.C. 2005) (the 8% HOEPA trigger is calculated using the principal amount of the loan, less total points and fees, to obtain the total loan amount against which the 8% is applied).

CHAPTER 2

Transactions Covered under the Truth in Lending Act

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¶ 2.01 Preliminary Considerations of Coverage

In the primary text, add at the end of the citation in footnote 2 to Regulation Z § 226.1(c)(1):

Footnote 3 to the definition of "creditor" at Regulation Z § 226.2(17)(i) elaborates on what "regularly" means: "A person regularly extends consumer credit only if it extended credit (other than credit subject to the requirements of § 226.32) more than 25 times (or more than five times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any twelve-month period, the person originates more than one credit extension that is subject to the requirements of § 226.32 or one or more such credit extensions through a mortgage broker."

In the primary text, add at the end of footnote 2:

In Rosa v. Cutter Pontiac Buick GMC of Waipahu, Inc., 120 Fed.Appx. 76 (9th Cir. 2005), the Rosas did not sign the credit sale contract because they did not qualify for financing, but did sign an addendum to it and the court found there was a triable issue as to whether that bound them under Hawaii law and thus there was a transaction to trigger the TIL Act requirements. *See also supra* note 216.

As to who is a consumer, in Thomas D. Mangelsen, Inc., v. Heartland Payment Systems, Inc., 2005 WL 2076421 (D. Neb. 2005), the court held that, for the purpose of § 1643, in dealing with liability for unauthorized transactions, a merchant is not among the persons Congress intended to protect.

[1] Determining Coverage by Definitions and Exemptions

In the primary text, add at the end of footnote 6:

See also Nelson v. Farm Credit Services of North Dakota, PCA, 380 F. Supp. 2d 1061 (D.N.D. 2005) (the court looked to the primary purpose of the loans and determined that the purpose was agricultural in nature, to aid the borrowers with operating costs for their farming operation); Cashmere Valley Bank v. Brender, 116 P.3d 421 (Wash. App. 2005) (adopting a "quantitative" approach to a dual purpose loan and upon finding that more than 50% of the loan proceeds were used for a business purpose, found that the loan was exempt; not applying either the "original purpose" approach or an "all circumstances" approach). *But see* Kamara v. Michael Funding, LLC, 379 F. Supp. 2d 631 (D. Del. 2005) (a loan made primarily for commercial purposes but secured by a personal residence was covered; this is incorrect).

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[3] Coverage As Affected by State Law: Exemption and Preemption

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[b] Exemption

In the primary text, add at the end of footnote 52:

However, Board regulations interpret TIL Act § 1633 (exemption for state-regulated transactions) to exempt the state from the substantive requirements of TIL Act, and not the right of a private action for damages or rescission. Belini v. Washington Mutual Bank, F.A., 412 F3d 17 (1st Cir. 2005).

¶ 2.02 The Creditor Requirement

In the primary text, add a new sentence after the first sentence under the heading:

[1] Extenders of Credit

[a] The Person Must Regularly Extend Credit

First, note that the person must extend credit. Thus a loan servicer is not a creditor. *Stump v. WMC Mortgage Corp.*, 2005 WL 645238 (E.D. Pa. 2005).

In the primary text, add at the end of footnote 86:

In Carter v. Alston, 2005 WL 3021974 (E.D. Va. 2005), Alston, an individual, made a loan to Carter secured by Carter's residence. Alston was assisted by her attorney, and later sold the loan to IM Investments. The court held that Alston was not a creditor under any part of the definition as there was no evidence of other loans or that the attorney acted as a broker. *Compare* Hruby v. Larsen, 2005 WL 1540130 (D. Minn. 2005). The Hrubys, facing foreclosure, went to a lender, who referred them to an employee of the lender, who sent them to his brother. The brother purchased their home and then the parties signed a contract for the Hrubys to repurchase the house after two years of interest-only payments. The court properly held that the absolute deed coupled with the repurchase legally constituted a secured loan, and that the brother was a creditor as the employee brother had acted in the transaction as a mortgage broker. A comparable case is *In re* Robertson, 333 B.R. 894 (Bankr. M.D. Fla. 2005). These cases clearly illustrate the risk that a private individual contacted by a broker to invest in (make) a mortgage loan needs to be aware of.

[b] The Obligation Must Be Initially Payable to the Creditor

[i] General Rule

In the primary text, add at the end of footnote 92:

To illustrate this rule, *compare* Warburton v. Foxtons, Inc., 2005 WL 1398512 (D.N.J. 2005) (a parent corporation not listed on the note as a payee is not a creditor solely because it owns the subsidiary) *with* Gonzalez-Ramos v. Empresas Berrios, Inc., 360 F. Supp. 2d 373 (D.P.R. 2005) (where a subsidiary was not mentioned in the credit contract and was not authorized to act as a finance company, and all forms named Empresas and it filed the proof of claim in

bankruptcy, the parent corporation was a creditor). *See also* Jefferson v. Briner Inc., 2006 WL 1720692 (E.D. Va. 2006) (broker in the transaction was not a creditor because there was no evidence that broker either regularly extended consumer credit or that broker was the entity to whom borrower would have been indebted) and Parker v. Potter, 2007 WL 465560 (11th Cir. 2007) (assignee who held mortgage at time it was executed by debtor's wife was not considered a creditor under the TIL Act, and therefore assignee not obligated to give debtor's wife any TIL disclosures or notice of her right to cancel).

[c] Merchants Honoring Credit Cards

In the primary text, add at the end of footnote 109:

A merchant also is not a consumer protected by the TIL Act. Thomas D. Mangelsen, Inc. v. Heartland Payment Systems, Inc., 2005 WL 2076421 (D. Neb. 2005).

[2] Persons Who Do Not Extend Credit

***

[b] Assignees

In the primary text, add at the end of footnote 136:

See also Psensky v. American Honda Finance Corp., 875 A.2d 290 (N.J. Super. A.D. 2005) (involving a state law claim similar to the TIL Act; the court held it preempted in that to impose liability on the assignee of the contract would conflict with the intent of Congress where there would be no liability under the TIL Act). However, note that assignee liability under HOEPA may be greater than that under the TIL Act generally, in that the assignee of a HOEPA loan is subject to liability for any claim that could be asserted against the original lender. However, that also means the assignee steps into the lender's shoes and its liability cannot be greater. *See* Bynum v. Equitable Mortgage Group, 2005 WL 818619 (D.D.C. 2005) (an accepted offer of judgment by the lender precluded the same claims against the assignee). *See also* Durham v. Loan Store, Inc., 2005 WL 2420389 (N.D. Ill. 2005) (assignee had notice of the applicability of HOEPA, thus the protection of § 1639(d) was inapplicable). However, if there is no creditor in the transaction, there can be no assignee. Carter v. Alston, 2005 WL 3021974 (E.D. Va. 2005). *See also infra* ¶ 12.06.

¶ 2.03 The "Natural Person" Requirement

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[2] Sureties and Owners

While sureties probably need disclosure of the terms of the credit for which they are surety, and of the nature of the obligation they are assuming,[153] for the most part they are guaranteed neither under TIL. Guarantors, endorsers, and sureties generally are not consumers under the regulation, and so are not entitled to a copy of the disclosures.[154] Of course, nothing precludes them "sharing" the credit terms disclosures given their principal(s), which no doubt is the policy assumption behind the exclusion.

An exception arises if the surety is a natural person acting as guarantor for another natural person to whom a credit card is issued for consumer credit purposes. Such a surety is considered a "cardholder," which is a species of "consumer."[155] However, a person who is merely an authorized user on a card issued to another, and whose liability is limited to his or her own transactions, is not a consumer under TIL.[156] Likewise, an employee who is a co-obligor or guarantor of a card issued to the employer primarily for business use, is not a consumer under TIL.[157]

Generally, a consumer must be a "debtor,"[158] but an exception to this rule may arise in connection with the right of rescission, discussed *infra* in Chapter 8. In that context, a natural person is considered a consumer if that person's ownership interest in his or her principal dwelling is or will be subject to the security interest.[159] Thus, if a security interest is taken in *A*'s house, *A* is a

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153. *Cf.* the required disclosure to co-signers in Uniform Consumer Credit Code (U3C) § 3.208 (1974).

154. Commentary ¶ 226.2(a)(11)-1.*In the primary text, add at the end of footnote 154:*

See Community Nat'l Bank v. Nemo Dev., Inc., 124 P.3d 521 (Kan. Ct. App. 2005) (TIL Act is not applicable to a transaction between a bank and a corporation, which was identified as the sole borrower, and the fact that the notes were signed by the owner in both his corporate and personal capacity, thus personally guaranteeing the loan, did not transform the borrower so that the TIL Act would apply).

155. Regulation Z §§ 226.2(a)(8), 226.2(a)(11).

156. Commentary ¶ 226.2(a)(8)-1. If the card is issued to an individual for consumer purposes, the fact that an organization may be surety does not remove coverage, and, by the same token, if the card is issued for business use, the fact an employee sometimes uses it for consumer purposes does not subject it to protections afforded to consumer credit. Commentary ¶ 226.2(a)(8)-4.

157. Commentary ¶ 226.2(a)(8)-1.

158. Regulation Z §§ 226.2(a)(11), 226.2(a)(14). The necessity of a "debt" is discussed in the primary text at ¶ 2.05[3].

159. Regulation Z § 226.2(a)(11). *See* Briggs v. Provident Bank, 349 F. Supp. 2d 1124 (N.D. Ill. 2004) (ownership of the property in which a creditor is given a security interest is a prerequisite to TILA's right of

consumer for purposes of rescission even if *A* is not liable primarily or secondarily on the obligation secured by the house. This would be the case where a spouse applies for and is granted the individual credit, and the other spouse signs the mortgage but not the note.[160]

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rescission disclosure requirements, which are explicitly premised on home ownership. The undisputed facts in this case indicated that first plaintiff did not have an ownership interest in the home at issue prior to the loan and was therefore not entitled to damages. The second plaintiff, who did have an ownership interest in the home, was entitled to disclosures and was entitled to rescind the loan under TILA. When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers so the second plaintiff could rescind the loan as against both plaintiffs).

160. Commentary ¶226.2(a)(11)-2. *See also In re* Apgar, 291 B.R. 665 (Bankr. E.D. Pa. 2003) (spouse who granted mortgage on home but who was not the borrower was a consumer having the right to rescind). Another example would be a surety who secures his or her secondary obligation with his or her residence. *See* Sur-Gro Plant Food Co., Inc. v. Morgan, 504 N.E.2d 445 (Ohio App. 1985); Curry v. Fidelity Consumer Discount Co., 656 F. Supp. 1129 (E.D. Pa. 1987); primary text notes 9-14.

¶ 2.04 The Consumer Purpose Requirement

[1] General Rule

In general, for the TIL Act to apply, the credit extended must be "consumer credit," defined as credit "primarily for personal, family, or household purposes."[161] The obvious congressional thinking was that consumers are typically less sophisticated about credit transactions, have less bargaining power, or are generally confronted with take-it-or-leave-it credit terms. Thus the TIL Act's stated purposes are to enable consumers to be "able to compare more readily the various credit terms available," and "to avoid the uninformed use of credit," all in the expectation that "economic stabilization would be enhanced and the competition among the various financial institutions . . . would be strengthened."[162]

[a] Nonconsumer Purposes Generally

By contrast, TIL does not cover transactions intended primarily for business or commercial purposes.[163] Presumably this is because a business borrower borrows frequently enough (or can afford to hire experts) to become familiar with the terms of credit, and so needs no special disclosure.[164] Changing its mind in 1980, Congress has now also classified credit for agricultural purposes as non-

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161. Regulation Z §§226.1(c)(1)(iv), 226.2(a)(12). *See* Citibank (South Dakota), N.A. v. Mincks, 135 S.W.3d 545 (Mo. App. S.D. 2004) (plaintiff sued defendant after the defendant refused to continue paying on defendant's credit card account. Defendant asserted that because the remaining balance was for merchandise never delivered by the merchant, defendant was entitled to assert that as a defense against the plaintiff. Plaintiff asserted that because the particular purchase that constituted the remaining balance on the account was made for a business purpose, the defendant could not assert the non-delivery defense. Holding that the account was an open end consumer credit plan, the court decided that the "transaction" at issue was not the actual purchase, but the initial extension of credit to the consumer, and therefore the defendant was entitled to assert the non-delivery defense against the plaintiff). *See also* footnote 6, *supra.*

162. TIL Act §102(a), 15 U.S.C. §1601(a).

163. Regulation Z §226.3(a)(1). *See also* Osage Corporation v. Simon, 613 N.E.2d 770 (1993); *supra* this text 12.01[1], and Steel Valley Bank, N.A. v. Lawrence Tuckosh, 2004 WL 2070810, 2004-Ohio-4907 (Ohio App. Dist. 7 2004) (TILA does not apply to loans obtained by those who might otherwise be consumers when the loan is secured for business purposes, irrespective of how the loan proceeds are actually used. Here, the loan documents included language indicating that the funds were intended for business purposes, therefore TILA disclosure requirements did not apply). *See also* footnote 6, *supra.*

164. *See, e.g.,* S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967). Since the reason for the exclusion is knowledge, the exclusion is justified whether the debtors be "Mom and Pop" or a large corporation with more bargaining power. Obviously, even some individuals would not need disclosure, such as a car dealer when purchasing a *family car,* but the law wisely avoids this degree of subjective distinction.

consumer credit, for comparable reasons.[165] Some transactions with other borderline purposes are excluded from TIL coverage by the exemption rules discussed separately in the following sections.

[b] Agricultural Purpose

In the primary text, add at the end of footnote 177:

See also supra note 6.

165. TIL Act § 104(1), 15 U.S.C. § 1603(1). *See also* footnote 6, *supra.*

¶ 2.05 The Credit Requirement

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[3] The Absence of Debt

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[c] Option Contracts; Letters of Credit

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See also supra note 158.

252. Regulation Z §§ 226.17(b), 226.2(a)(13) (the creditor shall make disclosures before consummation, which means the time that a consumer becomes contractually obligated on a credit transaction). *See also* Bissette v. Colonial Mortgage Corp. of D.C., 477 F.2d 1245 (D.C. Cir. 1973); Rosa v. Cutter Pontiac Buick GMC of Waipahu, Inc., 120 Fed. Appx. 76 (9th Cir. 2005) (plaintiffs signed an addendum to a credit sale contract, but not the credit sale contract itself. Relying on the holding of Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003) in reversing a grant of summary judgment in favor of the defendant, the Ninth Circuit held that unfunded financing agreements are encompassed within the meaning of consummation under TILA and plaintiffs were entitled to a trial of their claim on the merits); and Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060 (11th Cir. 2004) (relying on Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119, 123 (4th Cir. 2003), the court held that TILA applied to a transaction where the consumer purchaser, seeking to buy a car and trade in his existing vehicle, signed a buyer's order reflecting the proposed purchase and a retail installment sale agreement setting forth the proposed financing. The dealer did not countersign either document; rather, it intended to sign only when a lender agreed to buy an assignment of the installment payments owed under the agreement. Thus, the transaction's closing and the completion of the purchase were left solely in the dealership's control. This is consistent with Regulation Z's exclusive reference to the consumer's commitment. "[T]he point at which the consumer . . . commits himself or herself to the purchase of credit, without regard for the degree of commitment of the lender . . . [is the point at which] the consumer becomes vulnerable to actual damage from the lender's inadequate or deceptive disclosures, for at this time he or she can be contractually bound to the terms of the lending contract at the option of the lender"); Commentary ¶ 226.2(a)(14)-1. Of course, there may be an extension of credit when an option is exercised if there is an agreement at that time to defer payment of a debt.

¶ 2.06 The Finance Charge or More-Than-Four-Installments Requirements

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[1] The Necessity for a Finance Charge

As originally enacted, the TIL Act covered only extensions of credit for which the payment of a finance charge was required. Congress saw the presence of a finance charge as the sine qua non of a credit transaction because it viewed the finance charge as the difference between the cash price and the credit price of the property, services, or money obtained in the transaction.[278] What constitutes a finance charge in most consumer credit transactions was, and is, clear and obvious. This is true whether the transaction is closed-end or open-end credit, and whether the charge is called "interest," "loan fee," "service charge," "time-price differential," or some other name. These charges identify explicitly the cost of credit, which under TIL is the finance charge.

But sometimes the existence of a finance charge is less evident. Consider *In re Sigle*, 310 B.R. 303 (Bankr. N.D. Miss. 2004) and *In re Collins*, 310 B.R. 299 (Bankr. N.D. Miss. 2004). In these cases, the lender paid a portion of the broker's fee and this should have been included in the plaintiff's finance charges as the lender's contribution to the mortgage broker's fee would be repaid by the plaintiff over the life of the loan through an elevated interest rate; the plain meaning of the statute: "payable by the consumer at or before closing" is dispositive. Thus despite the fact that the consumer himself didn't pay the fee at or before closing, it was *payable by him* at or before closing and should be considered. Conversely, courts rather consistently hold that "yield spread premiums" (payments from a lender to a mortgage broker out of the yield on the loan) are not finance charges as the consumer does not pay any extra amount for the premium (at least no identifiable extra amount). *See, e.g., Sigle v. Canton Home Improvement* (*In re* Sigle), 310 B.R. 303, 307 (Bankr. N.D. Miss. 2004). A similar issue exists with respect to real estate closing costs (generally excluded from the finance charge) if it can be demonstrated they are unreasonable (that is, inflated). *See, e.g., Johnson v. Know Fin. Group, L.L.C.*, 2004 WL 1179335, at 8 (E.D. Pa. 2004). For another example, in the case of a checking account that

278. Section 106(a) of the TIL Act (15 U.S.C. § 1605(a)) defines a finance charge as a charge imposed as an incident to the extension of credit and provides that the finance charge does not include charges of a type payable in a comparable cash transaction, such as taxes or license fees. *See* Commentary ¶ 226.4(a)-1.

bears a service charge of $2.50 until an overdraft line of credit is added, after which the service charge is $4.50, a $2 finance charge is imposed.[279] In a like manner, where a seller of real estate offers individual tracts for $10,000 each, but if the purchaser pays cash, the price is $9,000, the $1,000 difference is a finance charge for those who buy the property on credit.[280]

279. Commentary ¶ 226.4(b)(2)-1.

280. Commentary ¶ 226.4(b)(9)-1. *See also* Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998).

¶ 2.07 The Amount Requirement

[1] The Dollar Test

In the primary text, add at the end of the citation in footnote 318 to Regulation Z § 226.3(b):

See also Leal v. Sonic-Massey Pontiac Buick GMC, Inc., 444 F. Supp. 2d 1163 (D. Colo. 2006) (the buyers had sufficiently alleged that amounts financed for their vehicle did not exceed TIL's $25,000 jurisdictional maximum where they alleged the dealer wrongfully included amounts representing the negative equity in their trade-in vehicles and charges for non-existent add-on features in the amount financed for the new vehicle when those amounts were actually finance charges and the amount financed did not exceed $25,000 once those amounts were deducted); and *McBain v. Edgewater Bank*, 2006 WL 3446485 (W.D. Mich. 2006) (transactions over $25,000 that are not secured by real property or a dwelling are not covered by TIL).