

# Truth in Lending Act Amendment Affecting Mortgage Transfer Disclosures

November 01, 2009

As part of the Helping Families Save Their Homes Act (the “Act”), Congress amended Section 131 of the Truth in Lending Act (15 USC § 1641)(“TILA”) to include a new provision (Section 131(g)) that requires the assignee of a mortgage loan to notify a consumer borrower that his loan has been transferred. This notice requirement became effective immediately upon the President’s signature on May 19, 2009, so steps to implement it should be taken immediately.

For these purposes, a “mortgage loan” means “any consumer credit transaction that is secured by the principal dwelling of a consumer.” 15 USC 1641(g)(2). Under TILA, a “dwelling” is a one-to-four family residential structure, including a manufactured home or an individual condominium or cooperative unit. 15 USC § 1602(v). Lien position is not a criterion, so first and junior lien loans will be subject to the transfer notice. Similarly, there is no distinction made between closed-end open-end loans. The definition of “mortgage loan” appears to be broad enough to include not only a conventional first mortgage loan, but also a loan or retail installment contract secured by a manufactured home, as well as a home equity loan or line of credit. A loan secured by the borrower’s vacation home is not a “mortgage loan” for these purposes.

Pursuant to Section 131(g), the new owner or assignee of a mortgage loan must notify the borrower in writing within 30 days after his mortgage loan is sold or otherwise transferred. The notice must include:

1. The assignee’s identity, address and phone number;
2. The date of transfer;
3. Contact information for an agent or party having authority to act on behalf of the assignee;
4. The location of the place where transfer of ownership of the debt is recorded; and
5. Any other relevant information regarding the assignee.

15 USC § 1641(g)(1). The seller of the mortgage loan has no notice obligation under Section 131(g).

An assignee that violates this notice requirement will be subject to civil penalties under Section 130(a) of TILA. 15 USC § 1640(a). Effective July 31, 2009, the maximum penalty that an individual consumer may recover

for a TILA violation in connection with a closed-end loan secured by real property or a dwelling will increase from \$2,000 to \$4,000.

Section 131(g) is brief and leaves some unanswered questions regarding the required notice. For example, state laws vary regarding the recordation of the assignment of a note. In some states (including Louisiana), the transfer or assignment of a real estate-secured note is often not recorded in the public record. In addition, some lenders avoid the need to record the subsequent assignment of a mortgage loan by naming Mortgage Electronic Registration Systems (“MERS”) as the mortgagee on the security instrument. In such situations, it is unclear what information should be included in the notice of assignment to correspond to the fourth required item listed above. The Act’s scant legislative history does not reflect an intent by Congress to mandate recordation of the assignment of a note when state law does not otherwise require it. Perhaps the “best guess” solution to this question is to indicate, when applicable, that the transfer was not recorded.

Based on comments made while the Act was being debated by the Senate, it appears that Congress intended for the notice to be required only when ownership of the whole note is transferred or assigned. On this basis, the notice requirement would not be triggered when a creditor sells a loan’s servicing rights but retains ownership of the loan. However, the Section 131(g) notice should not be confused with the Real Estate Settlement Procedures Act (“RESPA”) notice that must be provided by the transferor and transferee servicers when the servicing of a first mortgage closed-end loan is transferred to a different servicer. See 24 CFR § 3500.21(d).

It does not appear that the Federal Reserve Board (“FRB”) will provide any clarification of Section 131(g)’s ambiguities. While it has the general authority to implement TILA Section 131(g) through Regulation Z, the FRB has indicated that, at least at this point, it does not intend to issue any formal guidance to make compliance with this provision easier.

The mortgage loan transfer notice requirement surprised almost everyone, and what is effectively a 30-day implementation period seems inadequate. There is good news if it is unlikely that your institution purchases mortgage loans often. The bad news is that failure to comply could result in civil penalties of up to \$4,000. It is important to act quickly to adopt appropriate procedures to implement this notice requirement.