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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 560

[No. 97–130]

RIN 1550–AB12

Disclosures for Adjustable-rate Mortgage Loans, Adjustment Notices, and Interest-rate Caps

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Interim final rule with request for comments.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing this interim final rule revising the initial disclosure requirements for adjustable-rate mortgage loans (ARMs) by savings associations. These changes conform the OTS rule to the parallel provisions in Regulation Z, as recently amended by the Federal Reserve Board (FRB). The revised rule permits a savings association to provide a borrower either a fifteen-year historical example of interest rates and payments or a statement that the periodic payment may substantially increase or decrease (together with the maximum interest rate and payment based on a $10,000 loan).

DATES: *Effective date:* January 8, 1998.

Compliance date: Compliance is optional until October 1, 1998.

Comment date: Comments must be received by March 9, 1998.

ADDRESSES: Send comments to Manager, Dissemination Branch, Records Management and Information Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, D.C. 20552. Attention Docket No. 97–130. These submissions may be hand-delivered to 1700 G Street, NW., from 9:00 A.M. to 5:00 P.M. on business days; they may be sent by facsimile transmission to FAX Number (202) 906–7755; or by e-mail: public.info@ots.treas.gov. Those commenting by e-mail should include their name and phone number. Comments will be available for inspection at 1700 G Street, NW., from 9:00 A.M. until 4:00 P.M. on business days.

FOR FURTHER INFORMATION CONTACT: Timothy R. Burniston, Director, (202) 906–5629, Compliance Policy; Susan Miles, Attorney, (202) 906–6798, or Karen Osterloh, Assistant Chief Counsel, (202) 906–6639, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

To assist borrowers in making informed decisions on the cost of credit, both the OTS and the FRB have issued regulations (12 CFR 560.210 and 12 CFR 226.19, respectively) imposing disclosure requirements on creditors issuing ARMs. The FRB disclosure rules at 12 CFR Part 226 implement the Truth in Lending Act (TILA)[1] and are commonly referred to as Regulation Z. Regulation Z applies to all lenders subject to the TILA, including savings associations. Regulation Z, however, specifically states that information provided in accordance with variable rate regulations of other federal agencies, such as the OTS, may be substituted for the disclosures required by Regulation Z.[2] To this extent, Regulation Z incorporates 12 CFR 560.210, and the OTS rule serves as an implementing regulation of the TILA.

Section 560.210, which applies to ARMs of more than one year that are secured by property occupied by or to be occupied by the borrower, derives from a regulation OTS's predecessor agency, the Federal Home Loan Bank Board (FHLBB), issued under its authority under the Home Owners' Loan Act (HOLA)[3] to ensure that savings associations operate in a safe and sound manner. The FHLBB believed such a regulation was necessary because ''Safe and sound lending using ARMs requires that the borrower have a full understanding of the type of obligation being incurred in order to make a reasonable and meaningful decision concerning ability to repay.''[4] Although originally the FHLBB regulation was more complex than Regulation Z, since 1988 the disclosures required under § 560.210 and its predecessors have been identical to those required under Regulation Z.

Under Regulation Z, if a variable rate transaction exceeds a term of one year and is secured by the consumer's principal dwelling, the creditor must provide various initial disclosures for each variable rate program in which the consumer is interested.[5] Until amended recently,[6] these loan disclosure provisions required both: (1) A fifteen-year historical example, based on a $10,000 loan amount, illustrating how payments and the loan balance would have been affected by interest rate changes implemented according to the terms of the loan program; and (2) the maximum interest rate and payment for a $10,000 loan originated at the most recent interest rate shown in the historical example assuming the maximum periodic increases in rates and payments under the loan, and the initial interest rate and payment for that loan. OTS's parallel regulation, § 560.210, has contained identical disclosure requirements.[7]

Section 2105 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA)[8] amended section 128(a) of the TILA to permit a creditor the option of providing a statement that periodic rates may substantially increase or decrease (together with the maximum interest rate and payment amount based on a $10,000 loan amount), in lieu of the historical example. On December 1, 1997, the FRB published final revisions to Regulation Z implementing section 2105 of EGRPRA.

II. Description of Interim Final Rule

To ensure that the initial disclosure requirements under OTS rules continue to be consistent with those in Regulation Z, the OTS is making the same revisions to its ARM disclosure

[1] 15 U.S.C. 1601 *et seq.*

[2] 12 CFR 226.19(b) n. 45a and 226.20(c) n. 45c.

[3] 12 U.S.C. 1463(a) and 1464(a).

[4] 50 FR 32005 (Aug. 8, 1985).

[5] 12 CFR 226.19(b)(2) (1997).

[6] 62 FR 63441 (Dec. 1, 1997).

[7] *Compare* 12 CFR 226.19(b)(2) (viii) and (x) (1997) *with* 12 CFR 560.210(b)(2) (viii) and (x) (1997).

[8] Pub. L. 104–208, 110 Stat. 3009 (September 30, 1996).

requirements at 12 CFR 560.210(b) as the FRB's recently adopted amendments to Regulation Z.

Existing § 560.210(b) requires a savings association offering an ARM to provide a number of initial disclosures for each adjustable-rate home loan program in which a consumer expresses an interest. Existing § 560.210(b)(2)(viii) requires a savings association to provide a fifteen-year historical example. Existing § 560.210(b)(2)(x) requires a savings association to provide the maximum interest rate and payment for a $10,000 loan.

The OTS interim final rule revises these disclosure requirements. A savings association may now provide either the historical example or the maximum interest rate and payment. If the savings association chooses the maximum interest rate and payment option, the savings association must provide the initial rate and payment amount and a statement that the periodic payment may increase or decrease substantially.

Consistent with the FRB final rule, the OTS interim final rule also modifies how the maximum interest rate is calculated under the maximum interest rate and payment option. Under the existing rule, the maximum interest rate is calculated using ''the most recent interest rate shown in the historical example.'' Since the savings association is not required to provide the historical example when it elects the maximum interest rate and payment option, the interim final rule uses ''the initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the particular loan program disclosure'' to calculate the maximum interest rate and payment. Additionally, the interim final rule defines the initial interest rate as the rate in effect as of an identified month and year for a particular loan program. This change eliminates any requirement that a savings association must update the maximum rate and payment disclosure more frequently than the loan program disclosure.

Under existing § 560.210(b)(2)(ix), a savings association must explain how a customer may calculate the payments for the loan amount, based on the most recent payment shown in the historical example. To allow customers to understand the relationship between their transactions and the disclosures made under the maximum interest rate and payment option, the revised rule requires a savings association to provide a similar explanation when it elects this option. *See* new § 560.210(b)(2)(ix). The FRB made a similar change to Regulation Z.

III. Public Comment

A. Revisions to Conform § 560.210 to New § 226.19

The OTS has determined that advance notice and comment ordinarily mandated by the Administrative Procedure Act (APA), 5 U.S.C. 553(b), are not required in this interim final rulemaking. The APA authorizes agencies to waive notice and comment procedures when the agency ''for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [9]

The OTS, for good cause, finds that notice and comment procedures for this interim rule are impracticable, unnecessary, and contrary to the public interest. The changes in the interim rule will reduce regulatory confusion by conforming the OTS disclosure rules (which, as discussed above, serve as an implementing regulation of the TILA), more closely to those of the FRB under TILA. The changes will not have an adverse impact on savings associations because the revisions reduce regulatory burden. Moreover, savings associations subject to § 560.210 have the option of complying with the revised disclosure requirements through October 1, 1998, the date on which compliance under new § 226.19 becomes mandatory. The OTS has also determined that the revised regulation will not have an adverse impact on consumers obtaining ARMs from savings associations, because while disclosure requirements have changed under the interim rule, the new disclosures conform to the disclosures authorized by section 2105 of EGRPRA and provided under the revised FRB rule. To the extent that the interim rule raises consumer issues, these issues have already been subject to public notice and comment in the related FRB rulemaking, a proceeding affecting a much wider spectrum of lenders and borrowers. Only one consumer organization commented on the FRB proposal and the FRB considered that comment in preparing its final rule. It is unlikely that public comment on the disclosure changes will raise new issues specific to savings associations. Nevertheless, the OTS seeks the benefit of public comment on these revisions.

B. Should the OTS Retain § 560.210?

The OTS also solicits public comment on both the scope and continued usefulness of § 560.210. Specifically, some commenters on OTS's 1996 Lending and Investment rulemaking argued that § 560.210 should be deleted because it unnecessarily duplicates the FRB disclosure requirements in Regulation Z.[10] This would conform OTS's regulations with those of the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, which do not contain provisions on ARMs disclosures and rely on Regulation Z. It would also be consistent with section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA), which instructs each Federal banking agency to review its regulations and remove duplicative requirements.

There are several arguments for retaining § 560.210, however. First, although the disclosure requirements are identical, unlike Regulation Z, § 560.210 applies both to liens on the consumer's principal dwelling and to the financing of second homes, including vacation homes. Removing this regulation might lessen the disclosures savings associations provide to borrowers financing second homes.

Additionally, by retaining its own regulation that is grounded in the HOLA rather than the TILA, the OTS may have greater flexibility in fashioning appropriate relief for violations of ARMs disclosure requirements. Section 165 of the TILA authorizes agencies to seek restitution only in certain instances where the creditor inaccurately discloses the annual percentage rate or finance charge or where section 165 itself requires a refund or credit.[11] Certain inaccurate disclosures (such as non-disclosure of an interest rate floor or disclosure of a non-existent interest rate floor) or actions by an association (such as using an incorrect index after issuing the initial disclosure statement or failing to adjust interest rates and loan payments on the date required by the loan contract) would not themselves constitute inaccurate disclosures of the annual percentage rate or finance charge. Any of these disclosures or actions might, however, result in the customer paying an overcharge on its ARM. The FRB's Commentary on Regulation Z indicates that section 165 requires refunds and/or credits only when a borrower's account balance exceeds the entire outstanding loan balance and ''does not apply where the consumer has simply paid an amount in excess of the payment due for a given

[9] 5 U.S.C. 553(b)(B).

[10] *See* 61 FR 50951, 50963 (Sept. 30, 1996).

[11] 15 U.S.C. 1607(e)(5).

period.'' [12] Thus, section 165 would not apply to overcharges on loans that have substantial remaining principal balances, although it would appear to impose an affirmative obligation on mortgage lenders to refund or credit any excess payments collected over the life of a loan when the loan is either prepaid or fully amortized.

In contrast, in enforcing § 560.210, as with any other HOLA-based OTS regulations, the agency has available to it the full panoply of enforcement actions available under section 8 of the Federal Deposit Insurance Act.[13] This includes seeking restitution when a savings association has been unjustly enriched or acted with reckless disregard.[14] This remedy may therefore be available for ARMs overcharges during the life of the loan, in contrast to section 165 of the TILA and Regulation Z.

IV. Effective Date

The OTS has determined that the 30-day delay of effectiveness provisions of the APA may be waived in this rulemaking. The APA at 12 U.S.C. 553(d) permits waiver of the 30-day delayed effective date requirement for, *inter alia*, good cause or where a rule relieves a restriction. The OTS finds that good cause exists for the same reason as discussed in Section III above. The OTS further finds that the 30-day delayed effective date requirement may be waived because this interim final rule relieves regulatory restrictions by reducing the number of disclosures required for certain ARMs.

Section 302 of the CDRIA requires that new regulations and amendments to regulations that impose additional reporting, disclosure, or other new requirements take effect on the first date of the calendar quarter following publication of the rule unless, among other things, the agency determines, for good cause, that the regulations should become effective before that date. OTS believes that an immediate effective date is appropriate since the interim rule relieves regulatory burden on savings associations. An immediate effective date will permit savings associations to reduce the number of disclosures they must provide and will reduce regulatory confusion by conforming OTS regulations more closely to those of the FRB. OTS does not anticipate that the immediate application of the rules will present a hardship to institutions. Indeed, OTS believes that CDRIA does not apply to this interim rule because it imposes no new burdens or requirements on thrifts. For these reasons, OTS has determined that the interim final rule should be effective upon publication in the **Federal Register**. Like the FRB rule, however, compliance with the OTS rule is optional until October 1, 1998.

V. Paperwork Reduction Act of 1995

The OTS invites comments on:

(1) Whether the proposed collection of information contained in this interim final rulemaking is necessary for the proper performance of the agency's functions, including whether the information has practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed information collection;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital and start-up costs of operation, maintenance and purchases of services to provide information.

Under the Paperwork Reduction Act of 1995, as codified at 44 U.S.C. 3507, no persons are required to respond to a collection of information unless it displays a currently valid OMB control number. The valid OMB control number assigned to the collection of information in this interim final rule will be displayed in the table at 12 CFR 506.1(b).

The OTS has received emergency approval for the recordkeeping requirements contained in this interim final rule from the Office of Management and Budget. Comments on all aspects of this information collection should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503, with copies to the OTS, 1700 G Street, N.W., Washington, D.C. 20552.

The reporting/recordkeeping requirements contained in this interim final rule are found at 12 CFR 560.210. The likely respondents/recordkeepers are OTS-regulated savings associations. The OTS needs the disclosures made by savings associations in order to ensure that associations comply with a statutory TILA requirement and to otherwise supervise savings associations.

Estimated number of respondents: 1,238.

Estimated average annual burden hours per respondent: 53.

Estimated number of total annual burden hours: 65,639.

Start-up costs to respondents: $160.

Records are to be maintained for the period of time respondent/recordkeeper owns the loan plus three years.

VI. Executive Order 12866

The Director of the OTS has determined that this interim final rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

VII. Regulatory Flexibility Act Analysis

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. The interim final rule does not impose any additional burdens or requirements upon small entities. Rather, the rule reduces the number of disclosures required for ARMs and eases the compliance burden on all savings associations, including small savings associations. Accordingly, a regulatory flexibility analysis is not required.

VIII. Unfunded Mandates Act of 1995

The OTS has determined that the requirements of this interim final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of more than $100 million in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Act of 1995, as codified at 2 U.S.C. 1571(a).

List of Subjects in 12 CFR Part 560

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations.

Accordingly, the Office of Thrift Supervision hereby amends title 12, chapter V, of the Code of Federal Regulations as set forth below:

PART 560—LENDING AND INVESTMENT

1. The authority citation for part 560 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1701j–3, 1828, 3803, 3806; 42 U.S.C. 4106.

2. Section 560.210 is amended by:

a. Revising the introductory text of paragraph (b)(2) including footnote 2;

b. Revising paragraph (b)(2)(viii);

c. Revising paragraph (b)(2)(ix);

d. Removing paragraph (b)(2)(x); and

e. Redesignating paragraphs (b)(2)(xi), (b)(2)(xii), and (b)(2)(xiii) as paragraphs

[12] 12 CFR part 226, Supp. I, Official Staff Interpretations, § 226.21, Comment 2.

[13] 12 U.S.C. 1818.

[14] 12 U.S.C. 1818(b)(6).

(b)(2)(x), (b)(2)(xi), and (b)(2)(xii), respectively.

The revisions read as follows:

§ 560.210 Disclosures for adjustable-rate mortgage loans, adjustment notices, and interest-rate caps.

* * * * *

(b) * * *

(2) A loan program disclosure for each adjustable-rate home loan program in which the consumer expresses an interest. The following disclosures, as applicable, shall be provided: [2]

* * * * *

(viii) At the option of the savings association, either of the following:

(A) An historical example, based on a $10,000 loan amount, illustrating how payments and the loan balance would have been affected by interest rate changes implemented according to the terms of the loan program disclosure. The example shall reflect the most recent 15 years of index values. The example shall reflect all significant loan program terms, such as negative amortization, interest rate carryover, interest rate discounts, and interest rate and payment limitations, that would have been affected by the index movement during the period; or

(B) The maximum interest rate and payment for a $10,000 loan originated at the initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure assuming the maximum periodic increases in rates and payments under the program; and the initial interest rate and payment for that loan and a statement that the periodic payment may increase or decrease substantially depending on changes in the rate.

(ix) An explanation of how the consumer may calculate the payments for the loan amount to be borrowed based on either:

(A) The most recent payment shown in the historical example in paragraph (b)(2)(viii)(A) of this section; or

(B) The initial interest rate used to calculate the maximum interest rate and payment in paragraph (b)(2)(viii)(B) of this section.

* * * * *

Dated: December 30, 1997.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 98–443 Filed 1–7–98; 8:45 am]

BILLING CODE 6720–01–P

[2] A sample disclosure form may be found in 12 CFR part 226, Appendix H–14.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8754]

RIN 1545–AS76

Debt Instruments With Original Issue Discount; Annuity Contracts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the federal income tax treatment of certain annuity contracts. The regulations determine which of these contracts are taxed as debt instruments for purposes of the original issue discount provisions of the Internal Revenue Code. The regulations provide needed guidance to owners and issuers of these contracts.

DATES: *Effective date:* The regulations are effective February 9, 1998.

Applicability dates: For dates of applicability, see § 1.1275–1(j)(8).

FOR FURTHER INFORMATION CONTACT: Jonathan R. Zelnik, (202) 622–3930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Sections 163(e) and 1271 through 1275 of the Internal Revenue Code (Code) provide rules for the treatment of debt instruments that have original issue discount (OID).

On February 2, 1994, the IRS and Treasury published in the **Federal Register** (59 FR 4799) final regulations under the OID provisions. On April 7, 1995, the IRS published in the **Federal Register** (60 FR 17731) a notice of proposed rulemaking relating to the federal income tax treatment of annuity contracts that are not issued by insurance companies subject to tax under subchapter L of the Code. The proposed regulations treat certain of these annuity contracts as debt instruments for purposes of the OID provisions.

The IRS received a number of written comments on the proposed regulations. In addition, on August 8, 1995, the IRS held a public hearing on the proposed regulations. The proposed regulations, with certain changes in response to comments, are adopted as final regulations. The comments and changes are discussed below.

Explanation of Provisions

Certain Annuity Contracts

The OID provisions generally apply to issuers and holders of debt instruments. The term *debt instrument* means any instrument or contractual arrangement that constitutes indebtedness under general principles of federal income tax law. See section 1275(a)(1) and § 1.1275–1(d).

Section 1275(a)(1)(B) excepts two types of annuity contracts from the definition of *debt instrument* (and, therefore, from the OID provisions). First, section 1275(a)(1)(B)(i) excepts an annuity contract to which section 72 applies if the contract ''depends (in whole or in substantial part) on the life expectancy of 1 or more individuals.'' Second, section 1275(a)(1)(B)(ii) excepts an annuity contract to which section 72 applies if the contract is issued by ''an insurance company subject to tax under subchapter L'' and the circumstances of the contract's issuance meet certain criteria.

The proposed regulations address only the first exception, which is contained in section 1275(a)(1)(B)(i). Under the proposed regulations, an annuity contract qualifies for the exception in section 1275(a)(1)(B)(i) only if all payments under the contract are periodic payments that: (1) are made at least annually for the life (or lives) of one or more individuals; (2) do not increase at any time during the life of the contract; and (3) are part of a series of payments that begins within one year of the date of the initial investment in the contract. An annuity contract that is otherwise described in the preceding sentence, however, does not fail to qualify for the exception in section 1275(a)(1)(B)(i) merely because it also provides for a payment (or payments) made by reason of the death of one or more individuals. Thus, under the proposed regulations, the exception in section 1275(a)(1)(B)(i) applies only to an immediate annuity contract with level (or decreasing) payments for the life (or lives) of one or more individuals. No deferred annuity contract qualifies for the exception.

Several commentators questioned the approach of the proposed regulations. In particular, they contended that the exception in section 1275(a)(1)(B)(i) should not be limited to those annuity contracts that require periodic payments to begin within one year of the date of the initial investment in the contract. That is, deferred annuities, if dependent in whole or substantial part on an individual's (or several individuals') survival, should also qualify for the exception in section 1275(a)(1)(B)(i).