

VIRGINIA ASSOCIATION OF MORTGAGE BROKERS

**A PRIMER ON COMPLIANCE
BY MORTGAGE BROKERS WITH
FEDERAL AND STATE DISCLOSURE LAWS**

OR

**WHAT MUST I DISCLOSE?
WHEN DO I DISCLOSE IT?
WHO GETS IT?**

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This paper addresses certain requirements of Federal and Virginia law. It is not comprehensive, and the reader should in no manner rely upon the information in this paper as legal advice. If you have questions about the law, seek advice from your lawyer.

A Primer on Compliance by Mortgage Brokers with Federal and State Disclosure Laws

I. Introduction

The Real Estate Settlement Procedures Act (“RESPA”), the Truth in Lending Act (“TILA”), the Equal Credit Opportunity Act (“ECOA”), the Fair Credit Reporting Act (“FCRA”), Title V of the Gramm-Leach-Bliley Act (“Title V”), and Virginia all have disclosure requirements applicable to mortgage brokers. The purpose of this paper is to identify and discuss briefly the timing requirements for when these disclosures must be given.

II. Prequalifications

RESPA

- If an application for a federally related mortgage loan does not identify specific property which will secure the loan, the submission is deemed to be an application for a prequalification and not an application for credit.
- RESPA does not require disclosures for prequalifications.

TILA

- Regulation Z permits creditors to rely upon RESPA and Regulation X in determining whether they have received a written application. Accordingly, an application for a prequalification is not an application for credit under TILA and does not trigger TILA disclosures.

ECOA

- A prequalification request does not trigger disclosures under RESPA or TILA unless a specific property is included on the application, but it may be an application under ECOA.
- The Official Staff Commentary on Regulation B (the “Reg. B Commentary”) gives examples as to the distinction between an inquiry for general information and an application.
- If the creditor evaluates the credit, makes a credit decision and communicates the decision, it is an application for purposes of ECOA and notification requirements are triggered.

- If the property is identified but the application is incomplete in other respects (*i.e.*, missing tax returns), the creditor may be required to provide RESPA and TILA disclosures even if it is not in a position to make a credit decision under ECOA.
- ECOA requires a creditor to take action within 30 days after receiving a completed application. It is important, therefore, to know whether the submission is an inquiry or an application. If oral applications are permitted (*i.e.*, the creditor does not have a policy of requiring all applications to be submitted in writing), it would be helpful to ask whether the consumer is submitting an application.

FCRA

- FCRA does not speak about prequalifications nor does it define when an application occurs. However, if a user of a consumer report takes adverse action on the basis of information contained in a consumer report, notice of the adverse action must be given to the consumer pursuant to FCRA.
- If adverse action is based on information obtained from a third party other than a consumer reporting agency, the user must disclose to the consumer his right to make a written request about the nature of such information at the time adverse action is communicated to the consumer.
- The user of such information must disclose the nature of the information to the consumer within a reasonable period of time following the consumer's written request if such request is received within 60 days after learning of such adverse action.
- Although the regulations for risk-based pricing have not yet (as of 12/04) been promulgated, FACTA says that, if any person uses a consumer report in connection with an application for or extension of credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from that creditor, the user shall provide a notice at the time of application for or the time of the approval of the application. The notice is not required if an adverse action notice is given. The notice must say that the terms were based on information from a consumer report obtained from an identified CRA. The notice must also include a statement that the consumer may obtain a copy of his consumer report without charge from the CRA and provide the contact information specified by the CRA.
- FACTA has amended FCRA to require certain mortgage lenders (a person who makes or arranges loans secured by one-to-four units of residential property). Such lenders must provide a special notice to the applicant and also provide the following information: the information and credit score model may be different than the credit score used by another lender; a current credit score or the most recent score calculated for the purpose of the loan; the range of possible credit score under the model used; all of the key factors that adversely affected the credit score of the consumer in the model used (not to exceed four

subject to Paragraph 9); the date on which the credit score was created; and the name of the person or entity that provided the credit score or credit file upon which the score was created.

Title V

- Title V requires a financial institution (which by definition includes mortgage brokers) to give an initial privacy notice to its customer at the time a customer relationship is established. This could occur at the prequalification stage.
- If an individual is simply making an inquiry and a customer relationship is not established, the broker is not required to disclose its privacy notice unless the broker communicates nonpublic personal financial information about the individual to a nonaffiliated third party.
- It depends, therefore, on whether a customer relationship is established at the time of prequalification as to whether a privacy notice must be delivered.

Virginia Law

- It is unlikely that any disclosures under Virginia law are required for a prequalification if an application is not taken.

III. Business Day

- Regulation X defines a “business day” to mean a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity’s business functions.
- For the most part, Regulation Z uses a similar definition. However, for purposes of rescission and Section 32 loans, “business day” means all calendar days except Sundays and specified legal public holidays.
- The legal holidays currently recognized are New Year’s Day, the birthday of Martin Luther King, Jr., Washington’s birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day.
- For purposes of Section 32 loans, “business day” has the same meaning as the rescission rule. Note, however, that while the right of rescission extends to midnight of the third business day, the three business-day period under § 226.32 does not.
- For example, if Section 32 disclosures are provided on a Friday, consummation could occur at any time on Tuesday, the third business day following receipt of the disclosures.

For purposes of rescission, the three-day rescission period for a loan closed on Friday would not expire until after midnight on Tuesday.

- ECOA, FCRA and Title V do not define “business day”.

IV. Application Disclosures

RESPA

1. General.

- Regulation X requires disclosures when an application is received in any of the ways applications are normally transmitted. This includes mail, hand delivery or through an intermediary agent or broker.
- An intermediary agent or broker is defined in the Reg. Z Commentary as a broker who customarily within a brief time after receiving an application inquires about the terms of several creditors with whom the broker does business and submits the application to one of them. This type of broker is responsible for only a small percentage of the applications received by that creditor.
- If an application reaches the creditor through an intermediary agent or broker, the application is deemed to be received when it reaches the creditor rather than when it reaches the agent or broker.
- A creditor may not delay providing disclosures in transactions involving either its legal agent or any other third party that is not an intermediary agent or broker.

2. Mortgage Servicing Disclosure.

- This disclosure is required at the time of application if there is a face-to-face interview with one or more applicants.
- If there is no face-to-face contact (*i.e.*, the application is made by mail or telephone), the disclosure must be mailed within three business days after receiving or preparing the application.
- *In a table-funded loan where the investor advances funds to a broker to close a loan, the mortgage broker is responsible for delivering the servicing disclosure statement to each applicant. If the broker funds and closes the loan in its own name before selling it to an investor, the broker is responsible for providing the servicing disclosure statement.*

- Accordingly, if there is a face-to-face interview with one or more applicants, the servicing disclosure statement must be delivered at the time of application by the broker in table-funded transactions or by the lender in situations where the lender is funding and closing the loan in its own name.
- An applicant present at the interview may acknowledge receipt of the statement at such time and also accept delivery of the statement on behalf of the other applicants.
- If co-applicants have the same address on their application, one copy of the statement delivered to that address is sufficient; if they have different addresses, a copy must be delivered to each co-applicant.
- The person delivering the mortgage servicing disclosure must obtain every co-applicant's written acknowledgment that they received the disclosure. If you do not receive the acknowledgment at the time of application, you must receive the acknowledgment before settlement.

3. **Special Information Booklet.**

- This booklet, prepared by HUD, must be delivered or mailed to the applicant not later than three business days after the application is received or prepared unless the application for credit is denied within such period. *If a mortgage broker is involved, the broker must distribute the booklet and the lender need not do so.*
- If the federally related mortgage loan involves an open-end credit plan as defined in Regulation Z (a "HELOC") and the lender or mortgage broker provides the borrower with a copy of the brochure entitled *When Your Home Is on the Line: What You Should Know About Home Equity Lines of Credit*, such delivery is deemed to be in compliance with Regulation X and HUD's special information booklet need not be provided.
- The special information booklet is not required on all loans subject to RESPA. Regulation X says that the booklet need not be provided in refinancing transactions, subordinate closed-end loans, reverse mortgages or any other mortgage loan if the purpose of the loan is not the purchase of a one-to-four family residential property.

4. **Good Faith Estimate.**

- The Good Faith Estimate ("GFE") must be delivered or placed in the mail to the loan applicant not later than three business days after the application is received or prepared unless the application is denied within such period.

- If the lender does business with a mortgage broker, it depends on the role of the broker as to whether the broker or the lender must deliver the GFE. *If the mortgage broker is the exclusive agent of the lender, either the lender or the broker must provide the GFE within three business days after the broker receives or prepares the application.*
- *If the mortgage broker is not an exclusive agent of the lender, the broker must provide a GFE within three business days of receiving a loan application based on the broker's knowledge of the range of costs. See Appendix C to Regulation X for HUD's suggested format for such disclosures.*
- If the mortgage broker has provided the GFE, the lender is not required to provide an additional GFE but is responsible for ascertaining whether the GFE has been delivered. If the application has been denied before the end of the three-business-day-period, the broker need not provide a GFE.
- If the lender requires the use of a particular provider of a settlement service, other than the lender's own employees, and also requires the borrower to pay any portion of the cost of such services, the GFE must state that use of the particular provider is required, and provide the name, address and telephone number of the provider, an estimate of the charges, and describe the nature of the relationship between the provider and the lender.

5. Settlement Statements (HUD-1 and HUD-1A).

- This disclosure must be available for inspection by the borrower during the business day immediately prior to closing. If the lender conducts its own closing, it must provide the settlement statement on all closed-end loans secured by a one-to-four family residential dwelling. The disclosure is optional for open-end, home equity lines of credit subject to Regulation Z.
- RESPA requires a settlement agent, including the lender if it acts as settlement agent, to use the HUD-1 statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. If there is no seller (a refinancing or subordinate lien loan), either the HUD-1 or the HUD-1A form may be used.
- It makes no difference whether a mortgage broker is involved in the transaction; the settlement agent is responsible for providing the settlement statement.

6. **Other RESPA Disclosures.**

- This memorandum does not discuss escrow account disclosures or disclosure requirements dealing with affiliated business arrangements since these disclosures typically will be given by lenders or servicers rather than brokers.

Truth in Lending

7. **Home Equity Lines of Credit (“HELOC’s”).**

- In general, TILA disclosures required by § 226.5b of Reg. Z, including the home equity brochure published by the Board of Governors of the Federal Reserve System (the “Federal Reserve Board”), must be provided when a HELOC application is provided to the consumer.
- The disclosures and the brochure must be delivered or placed in the mail not later than three business days following receipt of an application if the application is contained in a publication or is received by telephone or through an intermediary agent or broker.
- *If a person other than the creditor provides an application to a consumer for a HELOC, such person must provide the brochure at the time an application is provided.* If such person has the disclosures required by § 226.5b(d) of Regulation Z for the creditor’s HELOC, such person must also provide such disclosures at the time an application is provided.

8. **Disclosures for Closed-End Credit.**

- The disclosures required by § 226.18 of Regulation Z must be provided prior to consummation of the loan. However, in the case of a residential mortgage transaction (as defined) and in the case of a variable rate loan (where the APR may increase after consummation) secured by the consumer’s principal dwelling (an “ARM”), additional disclosures discussed below are required.

9. **Early TILA Disclosures.**

- If the purpose of the loan is to purchase or initially construct the borrower’s principal dwelling and the loan is secured by such dwelling and is subject to RESPA, the creditor must provide early good faith estimates of the disclosures required by § 226.18 before consummation or within three business days after the creditor’s receipt of a written application, whichever is earlier.
- The transaction must be both a residential mortgage transaction as defined in Regulation Z and a federally related mortgage loan as defined in Regulation X.

- If the application reaches the creditor through an intermediary agent or broker, the application is deemed to be received when it reaches the creditor rather than when it reaches the agent or broker.
- The early TILA disclosure is an estimate and therefore the APR and all disclosures of amounts and payment dates should be labeled as estimates. These disclosures are the same as would appear in a normal federal box for a closed-end loan.
- *If the loan is to be closed in the name of a mortgage broker, the broker is the “creditor” under TILA and is responsible for providing the early TILA disclosure. If the loan is to be closed in the name of the ultimate lender, the lender is responsible for providing the early TILA disclosure.*

10. Early ARM Disclosure.

- The disclosures required in connection with an ARM loan (a closed-end variable rate transaction secured by the consumer’s principal dwelling and having a term greater than one year) include (i) the booklet titled Consumer Handbook on Adjustable Rate Mortgages published by the Federal Reserve Board and (ii) a loan program disclosure for each variable rate program in which the consumer expresses an interest.
- The ARM disclosures required by § 226.19(b) must be provided at the time an application form is provided or before the consumer pays a non-refundable fee, whichever is earlier.
- If the lender receives a written application for an ARM loan through an intermediary agent or broker, the lender may deliver the disclosures or place them in the mail no later than three business days after it receives the written application. The three-day rule also applies if the application is taken over the telephone unless the consumer merely requests an application over the telephone, in which event the early disclosures must be included with the application sent to the consumer. If the creditor solicits applications through the mail, the creditor must also send the disclosures if an application form is included with the solicitation.

11. Final TILA Disclosure.

- If a lender makes early TILA disclosures in residential mortgage transactions subject to RESPA, § 226.19(a)(2) requires a disclosure of the changed terms prior to consummation or settlement if the APR differs from the estimate disclosed in the early disclosure by more than 1/8 of one percentage point in a regular

transaction or $\frac{1}{4}$ of one percentage point in an irregular transaction. A redisclosure is also required if a variable rate feature is added.

- If redisclosure is required, the creditor may provide a complete new set of disclosures or may redisclose only the terms that vary from those originally disclosed. New disclosures are not required if the only inaccuracies involved estimates other than the annual percentage rate and no variable rate feature has been added.
- Note that settlement may occur later than consummation. If a creditor elects to redisclose at settlement, disclosures may be based on terms in effect at settlement rather than at consummation.

12. **Rescission Notices under TILA.**

- Two copies of the rescission notice must be provided to any natural person who has an ownership interest in the principal dwelling securing the loan. A rescission notice is not required in a residential mortgage transaction (as defined) or a refinancing or consolidation by the same creditor except to the extent that new money is advanced.
- If there is more than one consumer who can rescind the transaction, each of them must receive two copies of the notice of the right to rescind and one copy of the TILA disclosures.
- Regulation Z does not expressly state when the rescission notice must be provided, but in general it should be given when the transaction is consummated. The consumer has three business days within which to rescind from the last to occur of the following three events: consummation; delivery of all material disclosures; and delivery of the rescission notice. Accordingly, if the loan closes on Monday but the rescission notice is not delivered until Wednesday, the three-day rescission period does not begin to run until Wednesday.
- Remember that the definition of “business day” for rescission purposes is different in that Saturday counts as a business day when rescission is involved even if the creditor’s office is not open on Saturday.

13. **Section 32 Loans.**

- Section 226.32 disclosures do not apply to residential mortgage transactions (as defined), open-end credit plans or reverse mortgages. However, if the loan qualifies as a Section 32 loan, the additional disclosures described in § 226.32(c) be provided to the borrower at least three business days before consummation.

- Unlike other early disclosure requirements, disclosures are considered delivered when received by the borrower, not when mailed by the lender. If the disclosures become inaccurate because a disclosed term changes, new disclosures must be given at least three business days before consummation.

14. Reverse Mortgages.

- Additional disclosures are required in connection with reverse mortgages. Section 226.31(c)(2) says these disclosures must be provided at least three business days before consummation of a closed-end loan and before the first transaction under an open-end credit plan.

Equal Credit Opportunity Act

15. Notice of Action.

- The creditor must notify the applicant of the action taken within 30 days after receiving an application that has been sufficiently completed to make a credit decision.
- In the case of an incomplete application, the applicant must be informed within 30 days of action taken or of the incompleteness in accordance with § 202.9(c)(2) of Regulation B.
- If adverse action is taken on an existing account, notice must be given within 30 days after taking adverse action.
- The applicant must be notified within 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the offered credit.

16. Appraisal Reports.

- Regulation B contains rules for providing appraisal reports if the credit is to be secured by a dwelling. If a creditor does not routinely provide the applicant with a copy of the appraisal report, then, if a creditor receives a written request from the applicant for an appraisal report, the creditor must either mail or deliver a copy of the appraisal report promptly (generally within 30 days) after receipt of the request, receipt of the report or receipt of reimbursement by the applicant for the report, whichever is last to occur.
- A copy of the appraisal does not have to be provided if the request is received more than 90 days after providing notice of action taken on the application or more than 90 days after the application is withdrawn.

- Creditors who provide appraisal reports only on request must give notice to the applicant of the right to receive a copy of the appraisal report.

V. Fair Credit Reporting Act

1. Permissible Purpose.

- It is advisable to always obtain from the consumer an instruction or consent that information about him may be obtained and used from a consumer reporting agency. Other permissible purposes exist in FCRA, but obtaining a consent should remove this issue from any doubt as to whether a permissible purpose occurred.

2. Adverse Action Notices.

- An adverse action notice is required by § 615(a) of FCRA if it were based on a consumer report; by § 615(b) if based on information obtained from a third party other than a CRA. Subsection 615(b)(2) contains a special rule with regard to information obtained from an affiliate of the user of the information. In such cases, the user must notify the consumer of the action taken and advise him that he may make a written request within 60 days of the nature of the information.
- If adverse action based on a consumer report is taken, the user must give a notice of the adverse action and provide to the consumer the name, address and telephone number of the CRA (including a toll-free telephone number of a nationwide CRA) that furnished the consumer report to the user. The user must tell the consumer that the CRA did not make the decision to take adverse action and is unable to provide the consumer a specific reason why the adverse action was taken. The consumer must also be given a notice of his right to obtain a free copy of his consumer report from the CRA and to dispute with the CRA the accuracy or completeness of information in the consumer report.
- If adverse action is based on information obtained from a third party other than a CRA, the user shall, within a reasonable period of time, upon the consumer's written request for the reasons of such adverse action, disclose the nature of the information to the consumer. § 615(b). The consumer's request must be made within 60 days of learning of such adverse action, and the user must clearly disclose to the consumer his right to make such written request at such time as the adverse action is communicated.

3. **Prescreening.**

- If a user makes a written solicitation for credit to a consumer that is not initiated by the consumer, the person must provide with each written solicitation a clear and conspicuous disclosure that information in the consumer report was used in connection with the transaction together with certain other information specified in § 615(d)(1) of FCRA. Such additional information includes information that the consumer may opt out of any future prescreening.

4. **Risk-Based Pricing.**

- Section 615(h) of FCRA requires a person who uses a consumer report in connection with an application for credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from that creditor, based in whole or in part on a consumer report, must provide a notice to the consumer. The regulators are still working on the regulations that will specify the information that must be in the notice. The notice must be provided at the time of application for credit or the time of communication of the approval of the application.

5. **Fraud Alert.**

- If a user receives a consumer report that contains an initial alert, extended alert or active duty alert, the user may not establish a new credit or extension of credit, other than under an open-end credit plan, in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer or grant any increase in credit limit on an existing credit account requested by a consumer unless the user utilizes reasonable policies and procedures to form a reasonable belief that the user knows the identity of the person making the request. In those cases where the consumer has specified a telephone number to user for identity verification purposes, the user must contact the consumer using that telephone number or take reasonable steps to verify the consumer's identity and to insure that the credit plan is not the result of identity theft. § 605A(h)(1)(B).

6. **Negative Information.**

- Financial institutions, as defined in Title V of the Gramm-Leach-Bliley Act (which include mortgage lenders and mortgage brokers), are required by § 623(a)(7) to provide a written notice to customers that they furnished negative information to one or more of the nationwide consumer reporting agencies. Model forms are available for use in giving the notice. The notice must be furnished prior to or within 30 days after furnishing such negative information. The notice may not be in the initial open-end TILA disclosures.

7. **Delivery of Information to Victims of Identity Theft.**

- Section 609(e) requires a user to provide under the circumstances set forth in this subsection information in its possession to the victim of identity theft, law enforcement agencies specified by the victim or investigating the theft and authorized by the victim to take such records. This subsection goes into detail regarding how to verify identity, a proof of claim of identity theft. Information provided must be without charge to the victim. Users do have authority under certain circumstances set forth in this subsection to decline to furnish information, and it is an affirmative defense to any action brought to state in its answer or in an affidavit that it has made a reasonably diligent search of its available business records and that the records requested do not exist or are not reasonably available.

VI. Title V of the Gramm-Leach-Bliley Act

1. **Effective Date.**

- Compliance with Title V was mandatory beginning July 1, 2001.

2. **Financial Institutions.**

- A lender regularly engaged in the business of making consumer loans secured by residential real property (“Mortgage Loans”) is deemed to be a “financial institution” and thus covered by Title V. Persons who broker Mortgage Loans are also treated as financial institutions and are covered by Title V. Lenders and brokers licensed under the Virginia Mortgage Lender and Broker Act must comply with Title V.

3. **Only Individuals Are Protected by Title V.**

- Title V applies to consumer transactions, not to extensions of credit for a business purpose. If you are required to give truth in lending (“TILA”) disclosures, the transaction is covered by Title V. If you don’t have to give TILA disclosures, Title V does not apply.

4. **Summary of Key Requirements.**

- You must respect the privacy of nonpublic personal financial information relating to your customers (“Private Information”) and protect and safeguard Private Information about your customers that you have collected.
- You must adopt a privacy policy. This can be done by having your Board of Directors adopt the appropriate resolutions.

- Unless one of the exceptions in the Act or the FTC’s Privacy Rule is available (an “Exception”), you cannot disclose, directly or indirectly, any Private Information about your customer to a nonaffiliated third party unless you first disclose to your customer that you intend to share such information and give him a reasonable opportunity to opt out.¹
- You must disclose your privacy policy to all of your existing customers prior to July 1, 2001.
- You must implement a monitoring system for customers who have opted out.
- Title V contains limits on the reuse of Private Information that you obtain from others or that you furnish to others.

5. **Consumers v. Customers.**

- Title V distinguishes between “consumers” and “customers” for purposes of notice requirements. A customer is a consumer with whom you have a continuing relationship. You are required to give a consumer notices under Title V only if you intend to disclose Private Information about him to a nonaffiliated third party. However, whether or not you share Private Information, you must give all customers a notice of your privacy policy at the time a customer relationship is established and annually thereafter during the continuation of the customer relationship.
- If a individual applies for a loan, he is deemed to be a consumer of a financial service even if the loan application is rejected and no customer relationship is established. If an individual furnishes information to prequalify for a consumer loan, he is a consumer within the meaning of Title V.
- The key thing to remember is that all customers are entitled to disclosures, but consumers with whom you do not have a customer relationship are entitled to disclosures only if you share Private Information with a nonaffiliated third party.

6. **Nonpublic Personal Information.**

- Private Information includes personally identifiable financial information, including any list or description of consumers or any list of individual street addresses and telephone numbers that is derived using account numbers or other personally identifiable financial information.

¹ All references herein to the sharing of Private Information assume that an Exception is not available.

- Private Information includes information provided to you by the consumer, information resulting from any transactions involving a financial product or service between you and the consumer, and any information you may otherwise obtain in connection with providing a financial product or service to the consumer.
- Private Information does not include publicly available information, such as information available in land records or court records.

7. **Required Disclosures.**

- You must disclose your privacy policy in writing to all existing customers prior to July 1, 2001.
- You must thereafter provide a notice to new customers when the customer relationship is established (an “Initial Notice”), and you must provide an annual notice so long as the customer relationship continues (an “Annual Notice”).
- If you share Private Information outside of one of the Exceptions, you must also (i) provide an opt out notice and give the consumer a reasonable opportunity to opt out before Private Information is shared, and (ii) give consumers as well as customers the Initial Disclosure.
- All disclosures must be written or, if the customer agrees, electronically.
- In certain limited circumstances, the Initial Disclosure may be given after the customer relationship is established. These include establishing a relationship that is not at the customer’s election, such as when you purchase a loan from another institution, or when providing a notice would substantially delay the customer’s transaction and the customer agrees to receive the notice at a later time.
- Title V requires that notices be delivered in a manner that each consumer can reasonably be expected to receive the notice in writing or, if the customer agrees, electronically. You may hand deliver, mail or post the notice on an electronic site.
- You may not rely upon a sign posted in your office, and you may not deliver notices solely by making oral explanations.

8. **Revised Notices.**

- If you change your privacy policy or decide to share Private Information other than as described in the Initial Notice, you must provide a revised privacy notice and, if you share Private Information, a new opt out notice.

9. When Must Annual Notices Be Given?

- Annually means at least once in any period of 12 consecutive months applied on a consistent basis during which the relationship exists. For example, if a customer opens an account on any day during 2001, you could provide an annual notice by December 31 of 2002 and be in compliance.
- Annual notices are not required once the customer relationship is terminated. For example, if the loan has been paid in full, you charge off the loan or if you sell the loan without retaining servicing rights, the customer's relationship with you is terminated.
- Once a Mortgage Loan is closed, the customer relationship between the borrower and the Mortgage Broker will typically terminate.

10. Contents of Notices.

- Title V contains fairly detailed requirements as to what must appear in the initial, annual and revised privacy notices. If you do not disclose and do not intend to disclose Private Information to nonaffiliated third parties, the notice may say this without further elaboration. You may provide more detailed information.
- If you disclose Private Information pursuant to one of the exceptions, you are not required to list the exceptions; you may simply state that you make disclosures as permitted by law.

11. Opt Out Provisions.

- There are several ways to provide an opt out notice. You may provide a toll-free phone number; you may include a reply form that shows an address to which the form should be mailed; or you may require any other specific means if it is reasonable for the consumer. You may not, however, make the consumer write his own letter requesting an opt out.
- If two or more consumers jointly obtain a loan from you, you may provide a single opt out notice unless one of them requests a separate notice. The notice must explain how you will treat an opt out direction from a joint consumer, any of whom have the right to opt out.
- A consumer may opt out at any time, and you must comply with his direction as soon as reasonable practicable. If you have already disclosed information before you receive an opt out notice, the direction applies only to subsequent disclosures.

- An opt out notice direction is effective until revoked by the consumer. If the customer relationship terminates, the opt out continues to apply to Private Information that you have collected during or related to the relationship.

12. Limits on Redisdisclosure and Reuse of Information and on Sharing of Account Number Information for Marketing Purposes.

- There are limits on your ability to redisclose and reuse Private Information. The rules differ depending upon whether the information is received under one of the Exceptions in §§ 14 or 15 of the FTC’s Privacy Rule or whether you receive the information outside of an exception.
- Similarly, there are separate rules on how you may disclose information, depending upon whether you receive that information pursuant to one of the Exceptions or outside of an Exception.

13. Exceptions to Notice and Opt Out Requirements.

- Sections 13, 14 and 15 of the FTC’s Privacy Rule contain the Exceptions.
- Section 13 applies if you provide the Initial Notice and enter into a contractual agreement with the third party prohibiting that person from disclosing or using the Private Information other than to carry out the purposes for which you disclose the information.
- The exceptions in Section 14 are more likely to be of use to Mortgage Brokers.
- The opt out right and the contracting requirements do not apply if you disclose Private Information as necessary to effect, administer or enforce a transaction that is requested or authorized by the consumer. This exception also provides an exception in connection with a proposed or actual securitization, secondary market sale (including sales for servicing rights) or similar transaction related to the consumer’s transaction.
- “Necessary to administer or enforce a transaction” means that the disclosure is required or is a lawful or appropriate method to enforce your rights or to carry out the transaction and record, service or maintain the customer’s account in the ordinary course. For example, taking an application and sharing that information with potential lenders would not require you to give your customer an opportunity to opt out. Similarly, if the customer defaults after the loan is made, the noteholder may share Private Information with his attorney without having to give the customer the opt out right.

- Section 15 contains the following additional exceptions:
 - With the consent or at the direction of the consumer, provided there has been no revocation of such consent or direction;
 - To protect the confidentiality or security of your records pertaining to the consumer, the service or product, or the transaction;
 - To protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability;
 - For required institutional risk control or resolving consumer disputes or inquiries;
 - To persons holding a legal or beneficial interest relating to the consumer;
 - To persons acting in a fiduciary or representative capacity on behalf of the consumer;
 - To provide information to insurance rate advisory organizations, guaranty funds or agencies or persons that are assessing your compliance with industry standards;
 - Your attorneys, accountants and auditors;
 - To the extent necessary to comply with the Right to Financial Privacy Act of 1978;
 - To law enforcement agencies, including government regulators, self-regulatory organizations or for an investigation on a matter related to public safety;
 - To a consumer reporting agency in accordance with the Fair Credit Reporting Act;
 - From a consumer report reported by a consumer reporting agency;
 - In connection with a proposed or actual sale, merger, transfer or exchange of all or a portion of a business or operating unit if the disclosure of Private Information concerns solely customers of such business or unit;
 - To comply with legal requirements;

- To comply with a properly authorized civil, criminal or regulatory investigation or subpoena or summons by governmental authorities; or
- To respond to judicial process or governmental regulatory authorities or other purposes authorized by law.

14. Relation to State Laws.

- Title V does not supersede or preempt a state law that affords protection greater than that provided by the Act. Accordingly, be alert to changes in Virginia law (or in the law of any other state where you do business) that provides greater protection to the consumer. For example, if state law requires an opt in rather than an opt out procedure, you would have to comply with state law.

15. Enforcement.

- The Federal Trade Commission will generally enforce Title V against Mortgage Brokers. Title V does not provide for a private cause of action, but consumer advocates will undoubtedly argue that failure to comply with Title V constitutes an unfair and deceptive trade practice.

VII. Virginia Disclosures

In addition to disclosures required by federal law, a number of disclosures are required by Virginia law in connection with residential mortgage loans. These requirements are scattered throughout the Code of Virginia (the “Code”), and the primary purpose of this summary is to alert readers to the existence and location of such requirements. The disclosure requirements applicable to mortgage brokers are set forth below in alphabetical order.

1. Application Disclosure.

- Section 6.1-2.9:5 of the Code provides that any lender *or broker* making or arranging first mortgage loans on owner-occupied property consisting of one-to-four family dwelling units (other than a lender making ten or less loans in any 12-month period) must provide the applicant at the time the loan application is received with a written statement:
 1. Describing when, if ever, interest, points and fees quoted will be locked in;
 2. Stating that all loan terms not legally locked in are subject to change until settlement; and

3. A good faith estimate of the processing time for the loan, taking into account the time needed for the performance of any local government inspections or other functions necessary to close.
- The disclosure given pursuant to subparagraph 2 above must be separately initialed by the applicant and the lender *or broker*. The examiners for the Bureau of Financial Institutions (the “Bureau”) routinely cite licensees for failing to give this disclosure in a timely manner.
 - The application disclosure notice must be given at the time of application. The Bureau has advised me informally that, if applications are received by mail or over the telephone, the disclosure may be furnished at the time disclosures required by federal law are mailed to the applicant. This typically would include, where applicable, the good faith estimate required by RESPA and the early truth in lending disclosures. The Bureau prefers that the cover letter used by a lender in sending out such notices make reference to the Virginia notice in order to provide evidence that the disclosure was given.

2. **Commitment Letters and Lock-In Agreements.**

- The Code does not require that a written commitment letter or a lock-in agreement be used. However, if a mortgage lender or broker licensed under the Virginia Mortgage Lender and Broker Act (the “ML&B Act”), decides to use either a written commitment or a written lock-in agreement, the Bureau’s Regulation 225-01-1601 requires licensed mortgage lenders *and brokers* to include certain information in such agreements. Those requirements are summarized below.

A written commitment agreement, if given, must include the following:

- Identification of the secured property (a formal legal description is not required);
- The principal amount and term of the loan;
- The interest rate and points if the commitment agreement is also a lock-in agreement or a statement that the mortgage loan will be made at the lender’s prevailing rate and points for such loans at the time of closing or a specified number of days prior to closing;
- The amount of any commitment fee and the time within which the fee must be paid;
- Whether or not funds are to be escrowed and for what purpose;
- Whether or not private mortgage insurance is required;

- The length of the commitment;
- A statement that, if the loan is not closed within the commitment period, the lender is no longer obligated by the commitment agreement and any commitment fee paid by the applicant will be refunded only under certain circumstances required by the Regulation and such other circumstances as are set forth in the commitment agreement; and
- Any other terms and conditions imposed by the lender.

If a written lock-in agreement is entered into, the agreement must contain:

- The interest rate and points for the mortgage loan and, if the rate is an adjustable rate, the initial interest rate and a brief description of the method of determining the rate, such as the index and the margin;
- The amount of any lock-in fee and the time within which the fee must be paid;
- The length of the lock-in period;
- A statement that, if the loan is not closed within the lock-in period, the lender is no longer obligated by the lock-in agreement and any lock-in fee paid by the applicant will be refunded only under the circumstances set forth in Section III.3 of the Regulation and such other circumstances as are set forth in the lock-in agreement;
- A statement that any terms not locked in by the lock-in agreement are subject to change until the loan is closed; and
- Any other terms and conditions imposed by the lender.

Notice also that, if an applicant has paid a commitment fee and the loan is not closed because of any of the following reasons, the commitment fee must be refunded:

- The commitment period was not a reasonable period of time given prevailing market conditions at the time the commitment agreement was entered into;
- The mortgage loan is turned down because of the applicant's lack of creditworthiness; or
- The mortgage loan is turned down because of the appraised value of the property intended to secure the loan.

If the applicant has paid a lock-in fee, the fee must be returned if the loan is not closed because the lock-in period was not a reasonable period of time given the prevailing market conditions at the time the lock-in agreement was entered into.

3. Mortgage Brokers/Realtors.

- The ML&B Act requires a mortgage broker who receives compensation to give the following notice if the mortgage broker or any affiliated person has otherwise acted as a real estate broker, agent or salesman in connection with the sale of the real estate securing the mortgage loan and such mortgage broker or affiliated person will receive any other compensation or thing of value from the lender, borrower, seller or any other person:

NOTICE: WE HAVE OFFERED TO ASSIST YOU IN OBTAINING A MORTGAGE LOAN. IF WE ARE SUCCESSFUL IN OBTAINING A LOAN FOR YOU, WE WILL CHARGE AND COLLECT FROM YOU A FEE NOT TO EXCEED _____% OF THE LOAN AMOUNT.

WE DO NOT REPRESENT ALL OF THE LENDERS IN THE MARKET AND THE LENDERS WE DO REPRESENT MAY NOT OFFER THE LOWEST INTEREST RATES OR BEST TERMS AVAILABLE TO YOU. YOU ARE FREE TO SEEK A LOAN WITHOUT OUR ASSISTANCE, IN WHICH EVENT YOU WILL NOT BE REQUIRED TO PAY US A FEE FOR THAT SERVICE.

IF YOU ARE A MEMBER OF A CREDIT UNION, YOU SHOULD COMPARE OUR INTEREST RATES AND TERMS WITH THE MORTGAGE LOANS AVAILABLE THROUGH YOUR CREDIT UNION.

BORROWER'S SIGNATURE

BORROWER'S SIGNATURE

The foregoing notice must be in at least 10-point type, and the prospective borrower is required to acknowledge receipt of such notice.

4. Prohibited Practices.

- Section 6.1-422 of the ML&B Act contains a list of prohibited practices relating to mortgage lenders and brokers. Among other prohibitions, a licensed lender would be in violation of this section if it failed to require the person closing the loan to provide the borrower prior to closing with a settlement statement and the required truth in lending disclosures. If the broker is closing the loan in its own name, it would be subject to this requirement.

5. RESPA.

- Section 6.1-2.13:2 of the Code (the Wet Settlement Act) requires any person making a referral to an affiliated settlement service provider to disclose the affiliation in accordance with the requirements of RESPA. The disclosure is required regardless of the amount of the person's actual ownership in the affiliated provider unless the ownership is 1% or less of the capital stock of the corporation or entity with securities registered under the Securities Exchange Act of 1934.

6. Truth-in-Lending.

- Section 6.1-330.79 of the Code requires every person subject to the Truth in Lending Act and Regulation Z to comply with such laws when offering or extending consumer credit.

7. Wet Settlement Act.

- Section 6.1-2.13:2 requires that any person making a referral to an affiliated settlement service provider must disclose the affiliation in accordance with the requirements of RESPA and provide such disclosure regardless of the amount of the person's actual ownership interest in the affiliated provider unless such ownership is 1% or less of the capital stock of a corporation or entity with registered securities under the Securities Exchange Act of 1934.

8. Appraisals.

- Section 6.1-2.9 requires mortgage lenders that require a borrower or applicant to pay for a residential appraisal to furnish to the borrower or applicant, upon request, and free of charge, for a copy of the written appraisal. If no appraisal exists, a statement of the appraised value must be given. The appraisal or statement of value must be given within 10 business days of receipt of the request.

9. **Assumptions.**

- Section 6.1-2.9:3 requires a holder of a note secured by a deed of trust to respond to a written request from an owner of residential real estate as to whether the holder will permit a qualified purchaser to assume the deed of trust. If the answer is in the affirmative, the following additional terms must be disclosed:
 - The rate of interest;
 - The balance of the escrow account;
 - Any fees or charges in connection with the assumption;
 - Usual limitations or requirements placed on the assumption; and
 - Other terms and conditions of the assumption deemed pertinent by the holder. The holder must also state the time period during which the disclosed terms are valid. The holder must respond in writing within 10 business days of receipt of a request. A holder receiving a second or subsequent written request within any 12-month period may charge a fee not to exceed \$15 for each additional request. The fee can be required to be paid in advance.

10. **Payoffs.**

- [Section 6.1-330.82 ...]
- If a borrower makes a written request for the payoff amount, a lender must provide a written statement within 10 business days setting forth the total amount to be paid as of a particular date to obtain a release. Such requests may be made once each 12 months without charge. A fee of up to \$15 may be imposed for each additional request within such period. _____ fax fees in excess of \$15 are not permitted. The Bureau has reminded licensees that Title V of the Gramm-Leach-Bliley Act would prohibit lenders from providing this information to anyone except the borrower unless the borrower gives written permission to release such information to a third person (i.e., attorney, settlement agent, new lender).
- The Bureau has taken the position that a fax request for loan payoff information constitutes a written request within the meaning of this section.

Warning

This memorandum does not address the timing of disclosures required in connection with the following:

- Servicing of a mortgage loan, including escrow disclosures under RESPA and any notices that may be required in connection with the force-placement of flood insurance under the Flood Disaster Protection Act;
- Notices to co-signers under any of the three federal Credit Practices Rules;
- Subsequent TILA disclosures for both open-end and closed-end credit;
- Procedures for handling billing error resolutions for open-end credit; and
- Any other notices that may be required under federal or state law.