

October 6, 1998

Ms.  
Auditor  
Co.

Dear Ms. :

I write in response to your letter of September 24, 1998. You posed two questions relating to a proposed Adjustable Rate Mortgage Note that intends to use both for initial financing of a residential mortgage loan and for refinancing existing balloon mortgages. I will answer your questions in the order asked.

1. You ask if it would be permissible to delete or cross out the words "or decreased" in section 4(D) and have the borrower initial that change. The purpose of this alteration would be to eliminate any limitation on the size of a downward adjustment in the loan's interest rate until the next change date. I believe that this change would not violate any provision of state law regarding consumer credit documents. However, I urge you to consult with private counsel to obtain advice on the impact such an alteration would have in light of all other applicable laws governing disclosures on loan documents.

It is my understanding that you intend to use this Note for both refinancing existing balloon mortgages as well as for initial financing of residential mortgage loans. You are advised to take care that all disclosures to the borrower required by Regulation Z are made in a timely and proper manner. I particularly call your attention to Regulation Z section 226.19(b)(1) and (2). Subdivision (1) requires the lender to furnish the borrower a copy of the booklet *Consumer Handbook on Adjustable Rate Mortgages* or "a suitable substitute." Subdivision (2) requires specific disclosures including, *inter alia*, either an historical example based on past rates for a \$10,000 loan or, alternatively, a worst case scenario for the rates on a \$10,000 loan. See Appendix H-14 of Regulation Z for additional guidance.

2. You have asked if could include a provision in the Note disclosing that it would impose a delinquency charge of up to 5% of the payment but not more than \$5.00 even though it does not have immediate plans to impose such a charge. The

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reasoning for this change is that \_\_\_\_\_ would then be able to impose the late fee if it decides to do so at some time during the life of the loan.

Since this Note is a nonprecomputed consumer loan, you have correctly identified the delinquency charge that may be imposed pursuant to WV Code 46A-3-113. Subdivision (2) of WV Code 46A-3-113 provides that “[a] delinquency charge may be collected at the time it accrues **or at any time thereafter.**” (emphasis added) Consequently, it is my opinion that if \_\_\_\_\_ Co. discloses the delinquency charge in the document but does not collect it, it would then be free to decide at a later date in the life of the loan to impose the charge **from that later date forward.** In other words, you could not waive delinquency charges for three years and then decide to retroactively impose thirty-six months of those charges. Rather, you could begin imposing such charges from the thirty-seventh month forward.

I would also caution you that making a decision to impose delinquency charges should be done in an across-the-board, even handed manner. Any selective imposition of such charges could expose \_\_\_\_\_ to charges of discrimination in its credit practices.

I hope this information is helpful to you. If you need further information, please feel free to contact me.

Sincerely,

Robert J. Lamont  
General Counsel