

2022 EDITION

A Guide to Real Estate Law in Virginia

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Drawn from the
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The Virginia Lawyer:
A Deskbook for
Practitioners



Continuing Legal Education
by the Virginia Law Foundation



A Guide to Real Estate Law in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

A GUIDE TO REAL ESTATE LAW IN VIRGINIA

Second Edition

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TABLE OF CONTENTS

<i>Chapters and Authors</i>	iii
<i>About the Authors</i>	v
<i>Acknowledgments</i>	ix
<i>Electronic Forms: Table and Instructions</i>	xi

CHAPTER 1: RESIDENTIAL REAL ESTATE SETTLEMENTS

1.1	LEGISLATION AFFECTING REAL ESTATE SETTLEMENTS	1
1.101	Real Estate Settlement Agents.....	1
1.102	Truth in Lending Act.....	3
1.103	Federal Flood Insurance	9
1.104	Real Estate Settlement Procedures Act	11
1.105	Dodd-Frank Wall Street Reform and Consumer Protection Act	14
1.106	Procedures Unchanged by 2015 Regulations.....	22
1.107	Virginia Real Estate Settlements.....	27
1.108	Virginia Residential Property Disclosure Act.....	30
1.109	Virginia Property Owners' Association Act	32
1.2	REPRESENTING THE PURCHASER.....	34
1.201	Contract Review	34
1.202	Loan Commitment Review.....	35
1.203	Coordination of Closing Requirements	36
1.204	Scheduling	37
1.205	Documents and Data.....	37
1.206	Title Examination and Title Insurance.....	46
1.207	Document Preparation	47
1.3	THE CLOSING	50
1.301	In General.....	50
1.302	Final Coordination and Review	50
1.303	Conduct of the Closing	53
1.304	Recording and Disbursement.....	54
1.4	POST-CLOSING	57
1.5	REPRESENTING THE SELLER.....	58
1.501	Contract Review	58
1.502	Document Preparation	58

TABLE OF CONTENTS

1.503	Inspections.....	58
1.504	Lien Payoffs.....	59
1.505	Clearing Title.....	59
1.506	Settlement Statements.....	60
1.507	Escrow Letters.....	60
1.508	Seller’s Certifications.....	60
1.509	Coordination of Closing.....	60
1.510	Disbursement of Proceeds.....	60
1.511	RETURNING ORIGINAL DOCUMENTS AND CLOSING FILE.....	61
	APPENDIX 1-1: PURCHASER'S REPRESENTATION INFORMATION AND CHECKLIST.....	63
	APPENDIX 1-2: SAMPLE OWNERS' AFFIDAVIT AS TO MECHANICS' LIENS AND POSSESSION.....	67
	APPENDIX 1-3: AFFIDAVIT THAT TRANSFEROR IS NOT FOREIGN NONINDIVIDUAL FOR PURPOSE OF WITHHOLDING OF TAX.....	71
	APPENDIX 1-4: AFFIDAVIT THAT TRANSFEROR IS NOT FOREIGN INDIVIDUAL FOR PURPOSE OF WITHHOLDING OF TAX.....	73
	APPENDIX 1-5: CERTIFICATE OF RESIDENCY.....	75
	APPENDIX 1-6: SELLER'S REPRESENTATION INFORMATION AND CHECKLIST.....	77
	APPENDIX 1-7: GENERAL WARRANTY DEED— VBA FORM.....	79
	CHAPTER 2: RESIDENTIAL LEASES	
2.1	COMMON LAW PRINCIPLES.....	81
2.2	EXCEPTIONS TO COMMON LAW PRINCIPLES.....	81
2.201	In General.....	81
2.202	Judicial Exceptions.....	82
2.203	Legislative Exceptions.....	82

TABLE OF CONTENTS

2.3	THE VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT OR THE VIRGINIA RENTAL HOUSING ACT	83
2.301	Introduction	83
2.302	VRTLA and VLTA	84
2.303	General Provisions of VRLTA.....	85
2.4	RENTAL AGREEMENTS	86
2.401	Terms and Conditions	86
2.402	Prohibited Provisions	87
2.403	Request for a Receipt or Written Statement.....	88
2.404	Effect of Unsigned or Undelivered Rental Agreement	89
2.405	Notice	89
2.406	Attorney Fees.....	90
2.407	Application Fees	90
2.408	Confidentiality of Tenant Records.....	90
2.409	Landlord-Provided Insurance	92
2.410	Processing Fee for Bad Checks	94
2.5	LANDLORD OBLIGATIONS UNDER VRLTA	94
2.501	Security Deposits.....	94
2.502	Inspection of Premises	98
2.503	Disclosures	98
2.504	Warranty of Habitability and Warranty of Fitness for Intended Purpose	99
2.505	Locks and Peepholes	102
2.506	Cable, Satellite, and Television Facilities.....	103
2.507	Limitation of Liability.....	103
2.508	Disclosure of Mold	103
2.509	Disclosure for Properties Located Adjacent to a Military Air Station.....	104
2.510	Disclosures Concerning Insecticide or Pesticide Application.....	104
2.511	Carbon Monoxide Alarms	104
2.6	TENANT OBLIGATIONS	105
2.601	Duty to Maintain Premises.....	105
2.602	Landlord's Rules and Regulations.....	108
2.603	Access	109
2.604	Surrendering Possession of Premises.....	113
2.7	TENANT REMEDIES	114
2.701	Constructive Eviction.....	114
2.702	Remedies Under the VRLTA	115

TABLE OF CONTENTS

2.8	LANDLORD REMEDIES.....	124
2.801	Remedies Before the VRLTA.....	124
2.802	Remedies Under the VRLTA.....	130
2.9	RETALIATORY ACTION.....	143
2.901	Common Law Action.....	143
2.902	Retaliation Under the VRLTA	144
2.10	MANUFACTURED HOME LOT RENTAL ACT.....	145
2.1001	General Provisions.....	145
2.1002	Landlord's Obligations.....	146
2.1003	Tenant's Obligations.....	147
2.1004	Rent; Liability of Secured Party Taking Possession of an Abandoned Manufactured Home	148
2.1005	Restrictions on Landlord's Activities	149
2.1006	Termination of Tenancy.....	150
2.1007	Sale or Lease of Manufactured Home by Manufactured Home Owner.....	150
2.1008	Manufactured Housing Bill of Rights	151
2.1009	Retaliatory Conduct.....	152
2.1010	Eviction of Tenant.....	153
2.1011	Damages and Injunctive Relief	154
2.11	RESIDENTIAL LEAD-BASED PAINT REGULATIONS	155
2.12	CHANGES TO LANDLORD-TENANT LAW IN RESPONSE TO THE COVID-19 PANDEMIC.....	156
2.1201	In General.....	156
2.1202	Federal CARES Act.....	156
2.1203	CDC Eviction Moratorium.....	160
2.1204	Virginia Code Changes Related to COVID-19.....	161

CHAPTER 3: REAL PROPERTY FORECLOSURES

3.1	DEED OF TRUST.....	165
3.101	Lien on the Collateral Securing a Loan.....	165
3.102	Default.....	165
3.103	Reinstatement.....	165
3.104	Legal Versus Equitable Title.....	165
3.105	Defects in the Deed of Trust.....	166
3.106	Reformation Actions	167

TABLE OF CONTENTS

3.2	TRUSTEE.....	167
	3.201 Impartiality	167
	3.202 Powers and Duties.....	167
3.3	HOW THE LIEN IS ESTABLISHED	167
3.4	PRIORITIES.....	168
	3.401 Purchase Money Deed of Trust.....	168
	3.402 Other Deeds of Trust.....	168
3.5	MORTGAGES	169
3.6	JUDICIAL FORECLOSURE.....	169
3.7	MISCELLANEOUS TERMS	170
	3.701 Individual and Bulk Offerings.....	170
	3.702 Environmental Disclaimer.....	170
	3.703 Management and Franchise Contracts	170
	3.704 License Agreements	171
	3.705 Next Highest Bidder.....	171
3.8	RIGHT OF REDEMPTION	171
3.9	THE DECISION TO FORECLOSE.....	171
	3.901 Requirement of Default.....	171
	3.902 Reinstatement Rights	172
	3.903 Prepayment Penalties upon Default	172
	3.904 Notice and Cure Periods	172
	3.905 Acceleration	172
	3.906 Servicemembers Civil Relief Act	173
	3.907 Purchase by Lender.....	173
	3.908 Purchase by Third Party.....	174
	3.909 Advertising the Sale.....	174
	3.910 Power of Sale	174
	3.911 Identity of the Trustee	175
	3.912 Priority of Lien	175
	3.913 Tenants	175
	3.914 Environmental Considerations.....	176
	3.915 Proffers.....	176
	3.916 Real Estate Taxes and Rollback Taxes	176
	3.917 Condominiums.....	177
	3.918 Personal Property.....	177
	3.919 Clouds on Title.....	178

TABLE OF CONTENTS

3.10	GATHERING DOCUMENTATION.....	178
3.1001	Original Note and Recorded Deed of Trust	178
3.1002	Assignment.....	180
3.1003	Statement of Account.....	181
3.1004	Title Insurance Policy	181
3.1005	Partial Releases	181
3.1006	Request to Foreclose; Engagement Letter	181
3.1007	Owner’s Address.....	182
3.1008	Leases	182
3.11	NOTICE OF SALE	182
3.1101	Contents.....	182
3.1102	To Whom Given.....	182
3.1103	By Whom Given	184
3.1104	Method of Delivery and Timing.....	184
3.1105	Fair Debt Collection Practices Act.....	185
3.12	SUBSTITUTE TRUSTEE	185
3.1201	Eligibility	185
3.1202	Trustees Affiliated with the Lender.....	185
3.1203	Authority to Appoint.....	186
3.1204	Timing of Appointment.....	186
3.1205	Requirement for Written Appointment	186
3.1206	Requirement of Written Request to Foreclose.....	186
3.1207	Trustee as Purchaser	186
3.13	REVIEW OF LIENS AND OTHER MATTERS	187
3.1301	Title Examination	187
3.1302	Alternatives to Petitioning the Court	187
3.14	FILED MECHANICS’ LIENS.....	188
3.15	UNFILED MECHANICS’ LIENS	190
3.16	TITLE COMPANY’S LIABILITY FOR TITLE REPORTS.....	190
3.17	FEDERAL TAX LIEN	191
3.1701	Statute and Regulations	191
3.1702	Right of Redemption	191

TABLE OF CONTENTS

3.1703	Place and Date of Filing.....	191
3.1704	Effect of <i>United States v. Craft</i>	191
3.18	ADVERTISEMENT OF SALE	192
3.1801	Minimum Statutory Requirements	192
3.1802	Additional Advertising	194
3.1803	Personal Property.....	194
3.1804	Time-Share Property.....	194
3.1805	Miscellaneous Provisions	194
3.19	CONDUCT OF SALE.....	195
3.1901	Use of Auctioneers.....	195
3.1902	Qualifying Bidders	195
3.1903	Announcements	195
3.1904	One-Price Bids	195
3.1905	Contract of Sale	196
3.1906	Adequacy of Price	196
3.1907	Recess and Postponement.....	197
3.20	SETTLEMENT.....	198
3.2001	In General.....	198
3.2002	Postsale Issues.....	200
3.2003	The Trustee's Deed.....	201
3.21	ACCOUNT AND ACCOUNTING	201
3.2101	Statutory Requirement	201
3.2102	Effect of Failure to File Accounting.....	202
3.2103	Documentation	203
3.2104	Commissioners' Fees	207
3.2105	Trustee's Compensation and Expenses	207
3.2106	Real Estate Taxes.....	209
3.2107	Exceptions to Accounts.....	209
3.2108	Surcharge and Falsification.....	210
3.2109	Collateral Attacks.....	211
3.2110	Filing Deadline	211
3.22	DEED IN LIEU OF FORECLOSURE	211
3.2201	In General.....	211
3.2202	Advantages	211
3.2203	Disadvantages	211

TABLE OF CONTENTS

3.23	VIRGINIA LEGISLATION TO PREVENT FRAUDS ON BORROWERS BY MORTGAGE LENDERS AND RESCUE COMPANIES	213
3.2301	In General.....	213
3.2302	Predatory Practices by Mortgage Lenders or Brokers	213
3.2303	Foreclosure Rescue Companies	213
3.24	FEDERAL EFFORTS.....	214
3.2401	Consumer Financial Protection Bureau Mortgage Rules	214
3.2402	Mortgage Loans Subject to the Rules	214
3.2403	Exemptions from Requirements.....	214
3.2404	Early Intervention Requirements	215
3.2405	Loss Mitigation Procedures	215
3.2406	Prohibition on Foreclosure	216
3.2407	Effect of Partial Reinstatement.....	216
3.2408	Amendments to the 2014 Mortgage Rules.....	217
3.2409	COVID-19-Related Regulations	217
	APPENDIX 3-1: SUBJECT-TO PROVISION.....	219
	APPENDIX 3-2: AS-IS DISCLAIMER	223
	APPENDIX 3-3: FORFEITURE AND NEXT HIGHEST BIDDER PROVISION.....	225
	APPENDIX 3-4: AFFIDAVIT OF NONMILITARY STATUS	227
	APPENDIX 3-5: LOST NOTE AFFIDAVIT	229
	APPENDIX 3-6: LOST NOTE LETTER.....	231
	APPENDIX 3-7: LOST NOTE COMPLIANCE AFFIDAVIT FOR FORECLOSURE SALES OF OWNER-OCCUPIED RESIDENTIAL REAL ESTATE	233
	APPENDIX 3-8: NOTICE OF SALE LETTER	235
	APPENDIX 3-9: NOTICE TO CONDOMINIUM OWNERS' ASSOCIATION.....	239
	APPENDIX 3-10: TRUSTEES' APPOINTMENT DEED	241

TABLE OF CONTENTS

APPENDIX 3-11: PETITION FOR AID AND DIRECTION 243

APPENDIX 3-12: REQUEST FOR TITLE REPORT
(AND COMMITMENT)..... 245

APPENDIX 3-13: NOTICE TO INTERNAL REVENUE SERVICE 247

APPENDIX 3-14: INTERNAL REVENUE SERVICE
RIGHT OF REDEMPTION 251

APPENDIX 3-15: NOTICE OF TRUSTEES' SALE—RESIDENTIAL 253

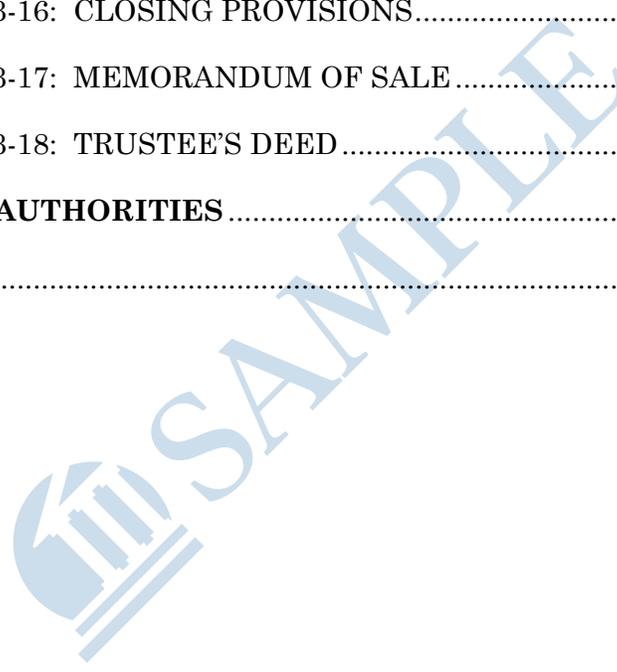
APPENDIX 3-16: CLOSING PROVISIONS..... 255

APPENDIX 3-17: MEMORANDUM OF SALE 257

APPENDIX 3-18: TRUSTEE'S DEED 263

TABLE OF AUTHORITIES 267

INDEX I-1



CHAPTER 1

RESIDENTIAL REAL ESTATE SETTLEMENTS¹

1.1 LEGISLATION AFFECTING REAL ESTATE SETTLEMENTS

1.101 Real Estate Settlement Agents.

A. In General. Title 55.1, chapter 10 of the Virginia Code, entitled “Real Estate Settlement Agents” (RESA), governs the authorization of settlement agents to conduct “escrow, closing or settlement services” in Virginia.² RESA was formerly known as, and sometimes is still referred to as, the Consumer Real Estate Settlement Protection Act (CRESPA). Historically, real estate settlement services were regarded as the practice of law, and nonlawyers were prohibited from serving as settlement agents in real estate transactions. In 1997, the Virginia State Bar (VSB) 12 C.F.R. § 1026.19(f) issued Unauthorized Practice of Law (UPL) Opinion 183, which reiterated that real estate closings were within the exclusive province of the practice of law. The General Assembly responded swiftly with the enactment of CRESPA, which enabled certain nonlawyers, including licensed title agents, title insurance companies, real estate brokers, and financial institutions, to serve as settlement agents.³ The VSB is tasked with issuing UPL guidelines for nonlawyer settlement agents to help them avoid inadvertently engaging in the unauthorized practice of law during the course of real estate transactions.⁴ A significant number of residential settlements are now handled by nonattorneys licensed under RESA.

B. Required Statutory Disclosure for Certain Residential Real Estate Contracts. RESA provides the following mandatory disclosure that must appear in all contracts involving the purchase of real estate containing not more than four residential dwelling units:⁵

¹ For a comprehensive discussion of this area of practice, see *Real Estate Transactions in Virginia* (Neil S. Kessler and Paul H. Melnick eds., Virginia Law Foundation 2019).

² Va. Code § 55.1-1000 *et seq.*

³ Act of Mar. 22, 1997, 1997 Va. Acts ch. 716 (codified at Va. Code § 55.1-1003).

⁴ Va. Code § 55.1-1014. The UPL Guidelines for Real Estate Agents are published online at www.vsb.org/site/regulation/upl-guidelines-for-real-estate-settlement-agents.

⁵ Va. Code § 55.1-1007.

All contracts involving the purchase of real estate containing not more than four residential dwelling units shall include in at least 10-point boldface type the following language:

“Choice of Settlement Agent: Chapter 10 (§ 55.1-1000 *et seq.*) of Title 55.1 of the Code of Virginia provides that the purchaser or borrower has the right to select the settlement agent to handle the closing of this transaction. The settlement agent’s role in closing this transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, the lender for the purchaser will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.

“Variation by agreement: The provisions of Chapter 10 (§ 55.1-1000 *et seq.*) of Title 55.1 of the Code of Virginia may not be varied by agreement, and rights conferred by this chapter may not be waived. The seller may not require the use of a particular settlement agent as a condition of the sale of the property.

“Escrow, closing, and settlement services guidelines: The Virginia State Bar issues guidelines to help settlement agents avoid and prevent the unauthorized practice of law in connection with furnishing escrow, settlement, or closing services. As a party to a real estate transaction, the purchaser or borrower is entitled to receive a copy of these guidelines from his settlement agent, upon request, in accordance with the provisions of Chapter 10 (§ 55.1-1000 *et seq.*) of Title 55.1 of the Code of Virginia.”

C. Registration of Settlement Agents. Virginia law requires all settlement agents, attorney and nonattorney, conducting real estate settlements to register with the appropriate licensing authority.⁶ Lawyers must register with the Virginia State Bar (VSB).⁷ The VSB's regulations govern the unauthorized practice of law and make it clear that legal advice in connection with a real estate settlement can only be provided by a licensed Virginia attorney.⁸ RESA also grants all purchasers or borrowers of Virginia residential property the right to select the settlement agent to provide escrow, closing, or settlement services and forbids the seller in any such transaction from requiring the use of a particular settlement agent as a condition of sale.⁹ However, builder-sellers often offer a significant package of upgrades as an incentive and consideration for the purchaser to opt to use the settlement agent chosen by the seller.

RESA allows nonlawyers who are properly registered as settlement agents to handle closings of any real estate located in Virginia, extending their ability to close commercial as well as residential transactions.¹⁰ Attorneys can close commercial real estate transactions without meeting RESA's requirements.¹¹

1.102 Truth in Lending Act.

A. Stated Purposes of the Act. The Truth in Lending Act¹² ensures that every consumer who has a need for consumer credit is given a meaningful understanding of the cost of that credit. The Board of Governors of the Federal Reserve System issued Regulation Z¹³ to implement the Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act.¹⁴ Although this Act applies to all types of consumer credit, this discussion

⁶ Va. Code § 55.1-1014(A). The VSB's RESA regulations, UPL guidelines, registration forms, attorney compliance certification forms, and surety bond forms may be downloaded from the VSB website at www.vsb.org/site/regulation/real-estate.

⁷ 15 VAC 5-80-30.

⁸ 15 VAC 5-80-40.

⁹ Va. Code § 55.1-1006.

¹⁰ See Va. Code § 55.1-1002(B).

¹¹ See Va. Code § 55.1-1000 (excluding attorneys from the definition of "lay real estate settlement agent").

¹² 15 U.S.C. § 1601 *et seq.*

¹³ 12 C.F.R. pt. 226.

¹⁴ Reg. Z, 12 C.F.R. § 226.1(a).

is limited to its effect on the settlement of real estate transactions and personal property used as a consumer's principal dwelling.

B. Application. Regulation Z applies to consumer credit transactions when:

- a. The credit is offered or extended to consumers;
- b. The offering or extension of credit is done regularly;
- c. The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
- d. The credit is primarily for personal, family, or household purposes.¹⁵

Regulation Z generally does not apply to loans made primarily for business, commercial, or agricultural purposes.¹⁶ Regulation Z also does not apply to loans made to entities other than natural persons, except for trustees of a living trust.¹⁷ Regulation Z was amended and enlarged under the 2013 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).¹⁸

C. Lender Disclosure Requirements. Regulation Z imposes early disclosure requirements on lenders involved in covered transactions. The loan disclosures must be made in writing in a form that the borrower may keep.¹⁹ Disclosures must be made before consummation of a covered transaction, and the closing may not conclude until seven days after the disclosures are made.²⁰ The disclosures required include:

- a. The identity of the creditor making the disclosures;
- b. The amount financed;

¹⁵ Reg. Z, 12 C.F.R. § 226.1(c).

¹⁶ Reg. Z, 12 C.F.R. § 226.3(a)(1). *But see* Reg. Z, 12 C.F.R. § 226.1(c)(2)-(4).

¹⁷ Reg. Z, 12 C.F.R. § 226.3(a)(2).

¹⁸ Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See infra* ¶ 1.105.

¹⁹ Reg. Z, 12 C.F.R. § 226.17(a).

²⁰ Reg. Z, 12 C.F.R. § 226.17(b).

-
- c. An itemization of the amount financed;
 - d. The finance charge;
 - e. The annual percentage rate;
 - f. The variable rate, if applicable;
 - g. The payment schedule;
 - h. The total of all payments;
 - i. The demand feature, if there is one included in the obligation;
 - j. In a credit sale, the total sale price;
 - k. Whether or not a penalty may be imposed for prepayment;
 - l. Whether there is a late charge;
 - m. Whether the creditor will acquire a security interest in the property purchased as part of the transaction;
 - n. The items required by 12 C.F.R. § 226.4(d) in order to exclude certain insurance premiums and debt cancellation fees from the finance charge;
 - o. The disclosures required by 12 C.F.R. § 226.4(e) in order to exclude from the finance charge certain fees prescribed by law or certain premiums for insurance in lieu of perfecting a security interest;
 - p. A statement that the consumer should refer to the appropriate contract document for information about nonpayment, default, and other terms;
 - q. In a residential mortgage transaction, a statement whether or not a subsequent purchaser may be permitted to assume the remaining obligation on its original terms;
 - r. The required deposit;

- s. Various information about the interest rate and payments; and
- t. The statement that there is no guarantee the consumer can refinance the transaction to lower the interest rate or periodic payments.²¹

D. Right of Rescission. Regulation Z gives the consumer in most credit transactions three days to rescind:

In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction . . . until midnight of the third business day following consummation, delivery of the notice [of the right to rescind] . . . or delivery of all material disclosures, whichever occurs last.²²

For the purposes of this part of Regulation Z, a business day is any calendar day except Sundays and all legal public holidays specified in 5 U.S.C. § 6103(a), currently: New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.²³

E. Exempt Transactions.²⁴ Under the Truth in Lending Act, the right of rescission does not apply to:

- a. A residential mortgage transaction, that is, one in which a lien is created or retained to finance the acquisition or initial construction of the consumer's principal dwelling (this includes second liens as well as first liens);²⁵

²¹ Reg. Z, 12 C.F.R. § 226.18(a)-(t).

²² Reg. Z, 12 C.F.R. § 226.23(a)(1), (3).

²³ Reg. Z, 12 C.F.R. § 226.2(a)(6).

²⁴ Reg. Z, 12 C.F.R. § 226.23(f).

²⁵ Reg. Z, 12 C.F.R. § 226.2(a)(24).