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August 21, 2008

Via e-mail to [sputzier@dfi.wa.gov](mailto:sputzier@dfi.wa.gov)

Ms. Susan Putzier, Executive Assistant  
Consumer Services Division  
Washington State Department of Financial Institutions  
PO Box 41200  
Olympia, WA 98504-1200

RE: **SHB 2770 Rulemaking**

Dear Ms. Putzier:

This letter is in follow up to our letter of August 5, 2008, and to questions posed at the hearing on the above rulemaking held on August 11, 2008 (the "Hearing").

***First***, CitiFinancial has requested that the Department provide a reasonable delay in the effectiveness of the Proposed Rule to allow state-regulated lenders and mortgage brokers time to program the new disclosure forms. At the Hearing, the Department asked CitiFinancial to provide further support for this request, in light of the fact that SHB 2770 became effective on June 12, 2008.

The obligation imposed on financial institutions SHB 2770, Section 3, Subsection (1) is to provide "a disclosure summary of all material terms, *as adopted by the department in subsection (2) of this section,*" to the borrower within three business days following receipt of a loan application." SHB 2770, Section 3, Subsection (2) obligates the Department to "adopt, *by rule*, a disclosure summary form" meeting certain parameters.

Both obligations arose on the effective date of the statute, June 12, 2008. It does not follow, however, that compliance with the statute on that date required (a) the Department to adopt, and (b) financial institutions to begin providing, disclosure summaries on that very date. The financial institution's obligation is to provide the disclosure summary adopted by the Department by rule. Until the Department adopts a disclosure summary by rule, compliance with this requirement by financial institutions is a factual and legal impossibility. Similarly, the Department's obligation is to adopt a disclosure summary *by rule*. The Department must therefore follow the administrative rulemaking procedures, and adoption of a disclosure summary before conclusion of those procedures would be a factual and legal impossibility. That the Department recognized that its obligation on the effective date was to initiate rulemaking, not adopt a disclosure summary, is evidenced by its decision to initiate negotiated, rather than expedited or emergency, rulemaking in its CR-101 filing on June 12, 2008.

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Nor is there anything in SHB 2770 that would override or negate any other facet of the Department's basic rulemaking authority or procedures. This includes the Department's ability to establish an effective date for its regulation:

### About Agency Rulemaking

For detailed information, read RCW 34.05 The Administrative Procedures Act, which governs agency rulemaking and RCW 19.85 The Regulatory Fairness Act which identifies when an agency must complete a Small Business Economic Impact Statement (SBEIS).

Generally, rulemaking takes place in three distinctive steps based on filings required by the Office of the Code Reviser:

1. A **CR-101 Pre-proposal Statement of Inquiry** is prepared. At this stage, proposed text is usually not available. Comment is invited on whether rules in the areas identified in the CR-101 are needed and, if so, the content of those rules.
2. A **CR-102 Rulemaking Proposal** is filed if it is decided to proceed. Proposed text is filed with the CR-102 and a comment period and public hearing are scheduled.
3. After the comment period and public hearing, a **CR-103 Rulemaking Order** will be filed if it is decided to proceed with the rule. The final text is included with the CR-103. The newly adopted rules are generally effective 31 days after filing with the Code Reviser.

Once a rule has been adopted, it becomes a part of the Washington Administrative Code (WAC).

<http://www.dfi.wa.gov/resources/rulemaking.htm#cs> (emphasis and underline added).

CitiFinancial is asking nothing more than that the Department follow its standard rulemaking guidelines and assign an effective date of 31 days after filing of the CR-103 Rulemaking Order with the Code Reviser.

**Second**, CitiFinancial has asked that the definition of "closing" be amended to allow the "three days before closing" requirement found in Proposed Rule 208-600-200(5) to coincide with the rescission period for refinance loans entitled to rescission under the federal Truth in Lending Act. At the Hearing, the Department requested further support for this request and suggested language.

CitiFinancial has a structured in-person pre-close review process. During this process, the loan terms are reviewed with the borrower and the borrower has the opportunity to request changes. The loan documents are not printed until the borrower approves and signs a pre-close loan offer summary that reflects the terms the borrower agrees to. If the borrower were to request a change that affected the Washington disclosure summary (such as a change in the rate/prepayment penalty combination or a request for additional funds), the closing would have to be cancelled, and the borrower would have to wait three days to return to the office to sign the loan documents (possibly having to take off work a second time), and then wait another three days for loan disbursement. As a result, these borrowers may tend to forego desired changes to avoid inconvenience.

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In support of this request, CitiFinancial notes that the SHB 2770 Section 3(1) requirement that redisclosures in the event of material changes “be provided to the borrower within three days of any such change or at least three days before closing, whichever is earlier,” is expressly and markedly different from the obligation imposed on mortgage brokers and loan originators under the Mortgage Broker Practices Act to disclose fee changes:

4) A mortgage broker or loan originator on behalf of a mortgage broker shall not charge any fee that inures to the benefit of the mortgage broker if it exceeds the fee disclosed on the written disclosure pursuant to this section, unless (a) the need to charge the fee was not reasonably foreseeable at the time the written disclosure was provided and (b) the mortgage broker or loan originator on behalf of a mortgage broker has provided to the borrower, no less than three business days prior to the signing of the loan closing documents, a clear written explanation of the fee and the reason for charging a fee exceeding that which was previously disclosed. However, if the borrower’s closing costs on the final settlement statement, excluding prepaid escrowed costs of ownership as defined by rule, does not exceed the total closing costs in the most recent good faith estimate, excluding prepaid escrowed costs of ownership as defined by rule, no other disclosures shall be required by this subsection.

RCW 19.146.030(4) (emphasis and underlining added). The use of these two distinct timing requirements indicates a legislative recognition that within the context of the escrow closing process typically used in Washington, there is a difference between signing the loan documents and closing.

As SHB 2770 does not define “closing,” definition of this term for the purposes of this disclosure requirement should lie within the Department’s rulemaking authority to “implement, interpret, or make specific” the laws it enforces. <http://www.dfi.wa.gov/cs/rulemaking.htm>. Viewed in terms of the goals of SHB 2770, it is reasonable to define the redisclosure requirement to coincide with the rescission period on loans subject to the TILA right to rescind, because TILA gives these borrowers three business days during which funding is delayed and the borrower has the opportunity to review the loan documents and disclosures (including the Washington disclosure summary) and cancel the loan transaction if desired. The borrower is protected, yet retains flexibility.

CitiFinancial suggests either of the following approaches to accomplish this:

1(c): “Closing” means the process of signing the loan documents and disbursing the loan funds. For the purposes of this statute:

- (i) Where the borrower is provided a right of rescission under the federal Truth in Lending Act, closing occurs at the expiration of the rescission period.
- (ii) Where the borrower is not provided a right of rescission under the federal Truth in Lending Act, closing occurs at the time the loan documents are signed.

1(c): “Closing” means the process of signing the loan documents and disbursing the loan funds.

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- 5(c) For the purposes of subsection (b), above:
- (i) Where the borrower is provided a right of rescission under the federal Truth in Lending Act, closing occurs at the expiration of the rescission period.
  - (ii) Where the borrower is not provided a right of rescission under the federal Truth in Lending Act, closing occurs at the time the loan documents are signed.

*Finally*, CitiFinancial notes with respect to its request that the accuracy of the fully indexed rate be measured as of the time of the disclosure, and that subsequent changes in the index rate after disclosure not trigger a redisclosure requirement, that for TILA disclosure purposes, whether or not the rate on a variable rate loan is discounted is determined based upon the index at the time the rate is set:

A loan in which the initial interest rate is set according to the index or formula used for later adjustments but is not set at the value of the index or formula at consummation is not a discounted variable-rate loan. For example, if a creditor commits to an initial rate based on the formula on a date prior to consummation, but the index has moved during the period between that time and consummation, a creditor should base its disclosures on the initial rate.

12 CFR Part 226, Supplement I, 226.17, *Paragraph 17(c)(1)*, 10(vi)

Thank you once again for the opportunity to comment and the Department's consideration of CitiFinancial's requests.

Sincerely,



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