The authority of the various FRB interpretations of TILA and Regulation Z has been the subject of substantial litigation. The issue first reached the Supreme Court in 1973 in *Mourning v. Family Publications Service*, in which the court upheld the FRB’s authority to promulgate the “four installment rule” in Regulation Z as a measurement for when a business “regularly” extends credit and is therefore subject to TILA. This decision emphasized the broad discretion delegated to the FRB to carry out the purposes of TILA.

The reasoning in *Mourning* was reinforced by the Court’s 1980 decision in *Ford Motor Credit Co. v. Milhollin*, which confirmed the veritable *carte blanche* that Congress had given the FRB and its staff to implement TILA. Specifically, the Court in *Milhollin* stated that:

- A high degree of deference to administrative interpretation is warranted;
- Credit transactions defy exhaustive regulation by a single statute, and Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit;
- To the extent they are construing “gaps,” or “interstitial silences” in the statute or regulation, FRB staff opinions construing the Act or Regulation Z should be dispositive unless they are demonstrably irrational.

*Milhollin* accordingly affords FRB official interpretations virtually the same deference as a regulation. Although *Milhollin* was decided under pre-Simplification TILA, many decisions have applied it to post-Simplification matters. The Supreme Court applied its standard again in 2004.

The Supreme Court has even given deference to an FRB amicus brief expressing an interpretation of Regulation Z. Deference to an amicus brief does not appear to be governed by the *Milhollin* standard, but is appropriate if it appears to be “a fair and considered judgment on the matter in question” rather than “a post hoc rationalization” advanced to defend past agency action from attack.

The deference to the CFPB’s official interpretations required by *Milhollin* is grounded in a system whereby those interpretive rules have been published for comment in the *Federal Register* for decades. Although the Supreme Court in *Perez v. Mortgage Bankers Association* upheld an unpublished U.S. Department of Labor opinion letter as compliant with the Administrative Procedures Act, the regulatory regime to implement the Truth in Lending Act is distinct from that of the Department of Labor. Notice and comment is an essential element of TILA official interpretations and a key basis for deference to them.

Section 1640(f) of TILA provides protection from liability where there has been good faith conformity with interpretations by CFPB officials or employees through procedures established by the Bureau (even if a provision is later invalidated by a court). Appendix C of Regulation Z sets out the nature of the official interpretations upon which good faith conformity can be based. Appendix C provides that “such interpretations will not be issued separately but will be incorporated in an official commentary to the regulation which will be amended periodically.” This language thus contemplates that official interpretations will appear as an official document that is amended from time to time in the same manner as is Regulation Z, not as an ad hoc set of unpublished letters.

This approach is further supported by language originally proposed to be included in Regulation Z’s appendix C but then omitted. The proposed language explicitly referred to publication in the *Federal Register* and an opportunity to comment. The supplementary information accompanying the final version of the appendix explained that the language was omitted because it was “unnecessary regulatory material” since periodic updates of the official interpretations would be “the regular vehicle for issuing interpretations.” This language was replaced with the existing language explaining that interpretations would not be issued separately but rather in an official commentary that would be periodically amended. This history suggests that the FRB planned to only issue official interpretations in accordance with the APA and believed that it did not need to say so more explicitly in Regulation Z’s appendix C.

Indeed, since 1981, the FRB and the CFPB have consistently published proposed, interim, and final official interpretations of Regulation Z pursuant to the notice-and-comment procedures. The only exceptions to a comment period (but not to publication) have occurred in very limited circumstances, such as: when the CFPB received jurisdiction over TILA and republished and renumbered Regulation Z and the Official Interpretations virtually unchanged as an interim final rule, when addressing minor errors, or withdrawing proposed changes or final rules, when deferring an effective date, or when granting temporary exceptions from compliance with specified provisions in an emergency. The historical practice by the FRB and the current practice of the CFPB of publishing official interpretations is itself a reinforcement of the notice and comment process.
Further, the Milhollin court, in describing the nature and extent of the deference accorded to the agency and its staff, noted that official interpretations that receive such deference are published in the Federal Register with opportunity to comment. In contrast, “unofficial interpretations” have “no special status” in establishing good faith conformity with TILA.

The CFPB proposed a policy on “no-action letters” in late 2014 and finalized it in early 2016. This policy does not change the requirement to publish official interpretations for notice and comment. Rather, it focuses on narrow circumstances in which innovative financial products and services that promise substantial consumer benefit face significant uncertainty regarding whether and how statutes or regulations apply. Among other things, the policy lists the information that should be included in a request for a no-action letter and the factors the staff may consider in deciding whether to provide the letter. The CFPB clearly states that any no-action letters would be non-binding on the Bureau and would not bind courts or other actors who might challenge the recipient’s product or service. Such letters stand in stark contrast to official interpretations, which are the CFPB’s binding views on the application of the statute and regulation. However, the Bureau proposed sweeping changes to the no-action letter policy in 2018, including expanding the policy beyond innovative products, stating that Bureau’s enforcement and supervision authority would not be used to take action against practices in compliance with the letters, and making such letters available to trade associations and other third parties. At the same time it proposed removing the temporary nature of such letters as well as the obligation to provide data to the Bureau. Readers should check the online version of this treatise for updates to this section.

Notwithstanding the deference due to its official interpretations, the CFPB’s authority is not without limits. If the statute is clear and unambiguous, a regulation that conflicts with it cannot stand. The agency staff (now at the CFPB) that write and revise the official interpretations is legally the same staff that previously wrote the interpretations upheld in Milhollin, and the staff is acting under essentially the same statutory authority. As a result, Milhollin suggests that staff pronouncements contained in the official interpretations be subjected to a two-step analysis. First, is the comment in question addressing an issue as to which the statute or regulation contains no “clear expression,” i.e., is it filling in a gap? If it is filling in the “interstitial silence,” then it must be determined whether the interpretation is “demonstrably irrational.” Unless it fails to meet that standard, it is good law.

The CFPB releases compliance bulletins on its website from time to time that usually do not appear in the Federal Register. The agency recognizes that the bulletins are non-binding:

This Compliance Bulletin summarizes existing requirements under the law and findings made in the course of exercising the Bureau’s supervisory and enforcement authority, and is a non-binding general statement of policy articulating considerations relevant to the Bureau’s exercise of its supervisory and enforcement authority. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b).

The CFPB’s position comports with Supreme Court precedent:

The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.”

Footnotes


1.5.3.2 Validity of Regulation Z and Official Interpretations

220 [220] Id. at 444 U.S. 557, 559–560, 565.


224 [224] Id., 131 S. Ct. at 881. See also Shaner v. Chase Bank, 587 F.3d 488 (1st Cir. 2009) (giving substantial deference to agency amicus brief, filed at court’s request, discussing effect of Regulation Z rules prior to new provisions on retroactive rate increases on credit card accounts).


227 [227] 12 C.F.R. 1026, app. C.

The text of Regulation Z’s appendix C has remained virtually unchanged since it was published in 1981. 46 Fed. Reg. 20,848 (Apr. 7, 1981). Appendix C was republished in 2011 with only minor changes when the CFPB re-numbered all of Regulation Z and the Official Interpretations shortly after it took over jurisdiction of TILA from the FRB. 76 Fed. Reg. 79,768 (Dec. 22, 2011).

228 [228] 12 C.F.R. 1026, app. C.


230 [230] 46 Fed. Reg. 20,848, 20,888 (Apr. 7, 1981) (“Language has been added to explain that a commentary to the regulation will be used as the primary vehicle for issuing official staff interpretations of the regulation. In most situations, official staff interpretations will not be issued separately but, instead, will be incorporated in this commentary.”).

231 [231] The FRB used “official” to refer to interpretations that were published in the ordinary course, whereas “unofficial” letters were not published for comment. See § 1.5.3.1 [3], supra.

232 [232] It is important to note that the FRB adhered to the notice-and-comment procedures from 1968 to 1981 to promulgate Regulation Z and its Official Staff Interpretations. During that time, however, the staff also issued unofficial interpretations. This latter practice was abandoned in 1981. See § 1.5.3.1 [3], supra.

In 2013, the CFPB adopted a regulation stating that it will publish “[s]ubstantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the CFPB” in the Federal Register. 12 C.F.R. § 1070.12(a)(4) (eff. Mar. 18, 2013); 78 Fed. Reg. 11503 (Feb. 15, 2013).

233 [233] 76 Fed. Reg. 79,768 (Dec. 22, 2011). The CFPB relied upon an exception to the APA notice-and-comment procedures where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice. 5 U.S.C. § 553(b), (c). The Bureau made specific findings that there was good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances, in part, because substantially all the changes made by the interim final rule were necessitated by the Dodd-Frank Act’s transfer of TILA authority from the FRB to the Bureau or were related to agency organization, procedure, and practice. 76 Fed. Reg. 79,768, 79,770–79,771 (Dec. 22, 2011).


236 [236] Id.


239 [239] Id. at 8692–8695.

240 [240] Id. at 8686.


243 [243] Milhollin at 444 U.S. 559–560, 565. See also Forney, A Discussion of the Supreme Court’s Second Truth in Lending Case: Milhollin, 14 Clearinghouse Rev. 95 (June 1980).

Note, however, that successfully challenging an official interpretations provision would be of prospective impact only. Creditors acting in good faith conformity with agency regulation or authorized staff interpretation are not subject to either administrative penalties under 15 U.S.C. § 1607 or private remedies under 15 U.S.C. § 1640 even if the regulation or interpretation is later deemed invalid; 15 U.S.C. § 1640(f); Official Interpretations Introduction-1; § 12.3.2 [5], infra.

Either way, Milhollin makes clear that the Board, and now the CFPB, is subject to substantial deference.

244 [244] See CFPB Implementation and Guidance [6], available at www.consumerfinance.gov.


1.5.3.2 Validity of Regulation Z and Official Interpretations

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