

# CONSUMER FINANCIAL SERVICES ALERT

An informational newsletter from Goodwin Procter LLP

## SUBSCRIBE

## CONTACT US

## BACK ISSUES OF CFSA

## FINANCIAL SERVICES ALERT

## OTHER PUBLICATIONS

## REGULATORY

Lynne Barr

Margaret Crockett

Agnes Bundy Scanlan

Michael Whalen

## LITIGATION

Thomas Hefferon

Brooks Brown

James McGarry

David Permut

Joseph Yenouskas

### **In this Issue:**

- FRB Releases Proposed Credit Card Rules
- Federal Court Dismisses Lawsuit Challenging MERS System and Seeking to Enjoin Foreclosures
- FFIEC Releases 2008 HMDA Data
- OTS Issues Credit Card Minimum Payment Guidance
- HUD Further Revises FAQs on New RESPA Rule
- OCC Publishes Reverse Mortgages Consumer Advisory

### **FRB Releases Proposed Credit Card Rules**

The FRB released proposed final rules amending the credit card provisions of Regulation Z. The proposal would add several new provisions to Regulation Z to implement those sections of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 that go into effect on February 22, 2010. The FRB also proposes to amend several provisions regarding unfair credit card practices, which were adopted in January 2009 as part of Regulation AA, and to incorporate them into Regulation Z. A summary of some of the major provisions of the proposal follows.

**Limits on APRs and Fees.** The proposal generally would prohibit the application of increased annual percentage rates and certain fees to existing balances, with several exceptions: (1) when a temporary rate lasting at least six months expires; (2) when the rate is variable; (3) when the minimum payment has not been received within 60 days after the due date; and (4) when the consumer successfully completes or fails to comply with the terms of a workout arrangement. The proposal also would permit the application of an increased APR when the rate has been reduced pursuant to the Servicemembers Civil Relief Act, and the SCRA ceases to apply. Creditors generally also would be prohibited from increasing an APR during the first year after an account is opened. In addition, certain account opening and other fees charged during the first year, other than fees for late payments, returned payments, and exceeding the credit limit, would be limited to 25% of the initial credit limit. After the first year, creditors would be permitted to increase the APR applicable to new transactions upon 45 days' advance notice.

**Over-the-Limit Fees.** The proposal would require that consumers opt in to the imposition of a fee or charge for making extensions of credit that exceed the account's credit limit (an "over-the-limit fee") and would impose certain disclosure requirements regarding the fee prior to the consumer's opt-in. This requirement would apply to new and existing account holders alike. Creditors also would be prohibited from (1) imposing more than one over-the-limit fee per billing cycle, (2) imposing an over-the-limit fee for the same transaction in more than three billing cycles, (3) assessing an over-the-limit fee that is caused by the

### **Disclaimer:**

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys.

### **IRS Circular 230 Notice:**

To ensure compliance with requirements under Treasury Department Circular 230, we inform you that the contents of this *Alert* are not intended or written to be used, and may not be used, for the purpose of (i) avoiding U.S. federal tax penalties or (ii) promoting, marketing or recommending to another party any matter addressed herein. Each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax adviser.

creditor's failure to promptly replenish the consumer's available credit, (4) conditioning the amount of available credit on the consumer's consent to the payment of over-the-limit transactions, and (5) imposing any over-the-limit fee if the credit limit is exceeded solely because of the creditor's assessment of fees or charges (including accrued interest charges) on the consumer's account. Periodic statements that reflect an over-the-limit fee would be required to contain a notice of the consumer's right to revoke consent to such fee.

Minimum Payment Disclosures. Credit card issuers would be required to include the following information on periodic statements: (1) a "warning" statement regarding making only minimum payments; (2) the number of months that it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and if no further advances are made; (3) the total cost to the consumer, including interest and principal payments, of paying the balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made, and the total cost to the consumer of paying that balance in full if the consumer pays the balance over 36 months; and (5) a toll-free telephone number at which the consumer may receive information about accessing credit counseling and debt management services. The proposal provide specific requirements to comply with this provision, as well as guidance regarding assumptions to be made when making the required calculations.

Underage Consumers and College Students. The proposal would prohibit a creditor from issuing a credit card to a consumer under the age of 21 unless the consumer has submitted a written application with either (1) the signature of a co-signer who is at least 21 years old who can make the required payments, or (2) information indicating that the underage consumer has the ability to make the required payments. The proposal also would limit a creditor's ability to offer a college student any tangible item to induce the student to apply for or open an open-end consumer credit plan on or near the campus of an institution of higher education or at an event sponsored by or related to an institution of higher education.

Additional Provisions. The proposal also would:

- Require creditors to apply the amount of a payment that exceeds the minimum payment to balances with the highest APRs first;
- Prohibit double-cycle billing;
- Require a creditor to consider a consumer's ability to make required minimum payments before opening a new credit card account for the consumer or increasing the consumer's credit limit; and
- With certain exceptions, require creditors to provide credit card agreements to the FRB and to post on their Web sites or otherwise make available their credit card agreements with their current cardholders.

The closing date for comments will be 30 days after publication in the *Federal Register*. The FRB intends to make the effective date of the final rulemaking February 22, 2010. [Click here](#) for a copy of the proposal.

### **Federal Court Dismisses Lawsuit Challenging MERS System and Seeking to Enjoin Foreclosures**

A federal district court in Arizona recently dismissed a putative class action seeking to enjoin non-judicial foreclosures in 29 jurisdictions. The lawsuit was one of seven related actions that challenge the viability of the MERS system for tracking ownership and servicing rights in mortgage loans, claiming that several large lenders established MERS solely to make “predatory” loans to borrowers and to hide their interests in the loans. The decision in *Cervantes* rejected a number of loan origination-related claims, as well as various conspiracy claims relating to MERS. The court dismissed the lawsuit with prejudice, and denied plaintiffs’ request to amend their complaint on the ground that doing so would be futile. Goodwin Procter partners Tom Hefferon, Gwyn Williams, and Joe Yenouskas represented Bank of America, Countrywide Home Loans, and Wells Fargo. [Click here](#) for *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT (D. Ariz. Sep. 24, 2009).

### **FFIEC Releases 2008 HMDA Data**

The FFIEC released the 2008 Home Mortgage Disclosure Act data on mortgage lending activity, including information on applications, denials, originations, and purchases. According to the FFIEC’s press release, there was a 31% drop in reported originations from 2007 to 2008. The incidence of higher-priced lending also declined from 2007 to 2008. Among all HMDA-reported loans, about 12% were higher-priced in 2008, down significantly from the historic high point of about 29% in 2006 and 18% in 2007. Among higher-priced loans, rate spreads in 2008 were lower than in previous years. The overall incidence of higher-priced lending reported in the 2008 HMDA data for all racial and ethnic groups was much lower than reported in 2007. However, according to the FFIEC, the 2008 HMDA data, similar to the data from earlier years, indicate that black and Hispanic white borrowers were more likely, and Asian borrowers less likely, to obtain higher-priced loans than were non-Hispanic white borrowers. For conventional home-purchase lending in 2008, the incidence of higher-priced lending (not adjusted for lender or borrower-related factors) was 17.1% for blacks, 15.4% for Hispanic whites, 6.5% for non-Hispanic whites, and 3.3% for Asians. In addition, the FFIEC reports that for both home-purchase and refinance lending in 2008, blacks and Hispanic whites had higher gross denial rates than non-Hispanic whites. The pattern for Asians was somewhat different, as the gross denial rate for this group was higher for home-purchase loans than for non-Hispanic whites, but about the same for refinance loans. [Click here](#) for the FFIEC’s press release.

### **OTS Issues Credit Card Minimum Payment Guidance**

The OTS issued a CEO Letter on “no interest, no payment” credit card programs that allow borrowers to defer making payments for extended periods. According to the OTS, these programs are most commonly associated with private label marketing agreements for

retailers such as electronics and furniture companies. In the letter, the OTS states that it expects lenders to require minimum payments that will amortize the current balance over a reasonable period of time consistent with the unsecured, consumer-oriented nature of the underlying debt and the borrower's documented creditworthiness. Specifically, the OTS states that the minimum monthly payment should cover at least a 1% principal balance reduction plus all assessed monthly interest and finance charges. The OTS indicates that a minimum payment should be required from borrowers each month for all credit card programs, including private label arrangements with retailers. While "no interest" promotions may be offered, the OTS expects there to be minimum monthly payments during the promotional period. [Click here](#) for the letter.

### **HUD Further Revises FAQs on New RESPA Rule**

On August 13th, HUD published FAQs on its 2008 amendment of Regulation X, the Real Estate Settlement Procedure Act's implementing regulation. The FAQs cover many provisions of the amendment, including when a loan originator must provide a GFE, expiration of the GFE, providing a list of settlement service providers, the changed circumstances re-delivery rule, and completing the GFE and HUD-1/1A. HUD has issued revised FAQs three times: August 19, September 4, and September 18. [Click here](#) for the FAQs as of September 18th.

### **OCC Publishes Reverse Mortgages Consumer Advisory**

The OCC published a Consumer Advisory to help consumers better understand reverse mortgages. The publication provides basic information about reverse mortgages, the costs and benefits of this product, and "rules of thumb" for consumers. [Click here](#) for the publication.