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A Mortgage and Consumer Finance Law Update

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Federal Reserve Board Issues First Interim Final Rule Under the Credit Card Act of 2009

On July 15, 2008, the Federal Reserve Board ("FRB") issued the first installment of rules amending Regulation Z and implementing the Credit Card Accountability, Responsibility and Disclosure Act of 2009. The interim final rule is effective on August 20, 2009; 90 days after President Obama signed the Credit Card Act of 2009 ("the Act") into law. Lenders beware: some of the changes apply to all open-end consumer credit plans, not just to credit card accounts.

As of August 20, creditors must begin mailing or delivering periodic statements on all open-end plans at least 21 days prior to the earlier date of: (1) the payment due date, or (2) the end of any period in which the consumer can repay credit and avoid a finance charge (i.e., a "free ride" or "grace period"). Under the new rule, the payment due date is the contractual date on which the payment is due, not any later date after which a late fee or other penalty may be imposed. For example, assume that the contractual payment due date is September 1, but the creditor may impose a late fee on or after September 11. The periodic statement must still be mailed or delivered 21 days prior to September 1.

The 21-day requirement applies to statements mailed or delivered on or after August 20, 2009. The FRB realizes that in the case of open-end plans that are not credit card accounts, creditors may be surprised by this new requirement and will not have had time to reprogram their statements. As such, the interim final rule provides that, "for a short period of time," statements may show payment due dates or grace periods that are inconsistent with the 21-day requirement. This is permissible as long as the creditor discloses, on or with a periodic statement, that the payment will not be treated as late, for any purpose, for at least 21 days after the statement is mailed or delivered to the consumer.

The second portion of the interim final rule implements the 45-day advance notice requirement for interest rate increases and other "significant changes" to the terms of credit card accounts: Credit card issuers must provide 45 days advance notice of an increase in the annual percentage rate unless the increase falls under one of the exceptions set forth in the Act. For a more detailed summary of the Credit Card Act of 2009, please visit: <http://www.lanepowell.com/wp-content/uploads/2009/06/060509.pdf>

The interim final rule enumerates the terms, "significant changes" in which, trigger the 45-day advance notice requirement. These include: (1) all annual percentage rates, (2) all terms required to be disclosed in tabular format under the rules that are scheduled to take effect on July 1, 2010, (3) the grace period, (4) the balance computation method, and (5) an increase in the minimum periodic payment.

The rule specifies the required content of the notice including a disclosure of the consumer's right to opt out of the change, if applicable.

Supreme Court Paves the Way for States to Enforce State Laws Against National Bank

On June 29, 2009, the U.S. Supreme Court handed State Attorneys General ("AGs") and other state officials a major victory. In a 5-to-4 decision in *Cuomo v. Clearing House Assn., L.L.C.*, et al., the Supreme Court ruled that the National Bank Act did not preempt the right of state officials to enforce state laws to which a national bank is subject. In 2005, then-New York Attorney General Eliot Spitzer issued letters to several major lending institutions requesting their cooperation (in lieu of subpoenas) in the AG's investigation of the lending industry for compliance with New York state fair lending laws. The Office of the Comptroller of the Currency ("OCC") and the Clearing House Association brought suit to enjoin the AG's actions, claiming that the AG's attempt to enforce state law was completely preempted by the National Bank Act. The District Court issued the injunction, and the Circuit Court of Appeals affirmed.

Partially overruling the Court of Appeals, the Supreme Court held that the "visitorial powers" over national banks that the National Bank Act granted to the federal officials and the authority to enforce state laws are two separate things. According to the Court, if a state chooses to pursue enforcement of its laws in court, its "targets" are sufficiently protected by the rules of discovery and other judicial procedures. Therefore, the Court ruled that the OCC's 2004 rule on Visitorial Powers is overbroad in that it provides that "prosecuting enforcement actions" lie within the exclusive purview of federal officials and outside that of state officials. However, the Court did agree with the lower courts that the New York AG did not have the authority to issue the threatened executive subpoenas and would be required to obtain judicial search warrants on a showing of probable cause. At a minimum, the OCC will be forced to amend its Visitorial Powers rule. The Supreme Court's opinion may also clear the way for the New York AG and other state officials to effectively exert more oversight over federally chartered institutions.

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