Client Alert.

April 8, 2011

Summary of Final CARD Act Clarifications

By L. Richard Fischer, Oliver I. Ireland and Obrea O. Poindexter

On March 18, 2011, the Federal Reserve Board ("FRB") issued a final rule to clarify certain recent amendments to Regulation Z, particularly those implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"). While the FRB indicated that the rule was intended to enhance consumer protection and to facilitate compliance by resolving areas of uncertainty, the final rule will significantly impact current industry practices and, in some instances, will require issuers to again revise compliance policies and procedures, application and account-opening disclosures, and change in terms notices and other consumer communications.

The effective date, as well as the mandatory compliance date, of the final rule is October 1, 2011. Issuers may, however, comply with the rule prior to the mandatory compliance date.

ABILITY TO PAY (SECTION 226.51)

Section 226.51 requires an issuer to assess a consumer's ability to repay his or her credit card obligations prior to opening a new account or increasing the line of credit on an existing account. In addition, Section 226.51(b) prohibits an issuer from opening an account for a consumer under the age of 21 unless the consumer has submitted a written application and either has the "independent means" of repaying the obligation or provides the signature of a cosigner with such means.

Since the issuance of the final amendments to Regulation Z in February 2010 ("February 2010 rulemaking"), questions have arisen concerning information provided by a consumer in response to a request, on an application form or otherwise, for household income and whether such response information can be used by an issuer to satisfy the ability to pay requirements. In addition, there has been uncertainty and varying agency interpretations concerning whether there are different standards for underage consumers and other consumers with respect to the consideration of household income or assets.

There also has been concern about whether and to what extent Regulation B, which implements the Equal Credit Opportunity Act, requires or permits an issuer to consider spousal or other income when considering a consumer's ability to pay.

"Independent ability" to repay. Although members of Congress, issuers, retailers, trade associations and individual consumers expressed concern that a rule limiting an issuer's ability to use household income would reduce access to credit, particularly for married women who do not work outside the home, the final rule requires an issuer to consider a consumer's independent ability to make the required payments on an account, regardless of the consumer's age.

Although the final rule does not prohibit an issuer from asking for household income, the rule states that an issuer cannot rely on household income in determining the consumer's ability to pay. Specifically, an issuer is not permitted to use "income and assets of … [a] person who is not liable for debts incurred on the account," including household income, in evaluating a consumer's ability to pay.

Thus, the final rule provides that "[c]onsideration of information regarding a consumer's household income does not by itself satisfy the requirement in § 226.51(a) to consider the consumer's independent ability to pay." That is, even though the CARD Act uses the term "independent" only in the context of a young consumer, under the final rule an issuer is required to consider the consumer's separate or "independent" ability to make the required payments, regardless of the consumer's age, unless, for example: (1) the spouse or other household member is a joint applicant or accountholder; or (2) applicable federal or state law grants the applicant an ownership interest in the income of his or her spouse.

The FRB also rejected concerns raised by commenters that prohibiting the use of household income was inconsistent with the spirit, if not letter, of Regulation B. In the supplemental information accompanying the final rule, the FRB concludes, with little discussion of the issue, that it does not believe the rule conflicts with Regulation B. The FRB acknowledged, however, that one could argue that a spouse who has access to household income has the ability to pay even if the spouse does not have a legal ownership interest in the income. Nonetheless, the FRB prohibits the use of household income based on its concern that allowing an issuer to consider a consumer's access to income for all consumers regardless of marital status could encourage consumers to overstate income information.

The FRB explains that overstating income can impede an issuer's ability to accurately assess a consumer's ability to pay. In this regard, in the supplemental information the FRB states that "[i]n the subprime mortgage lending market, the [FRB] found that lenders relying on overstated incomes to make loans could not accurately assess consumers' repayment ability" and that the CARD Act "was intended to prevent similar practices in the credit card market."

Application information. In addition, the final rule addresses the interrelationship of the obligation of an issuer to consider the ability of an applicant to repay amounts extended, on one hand, and the manner in which income information is requested on application forms, on the other. Issuers have used the phrase "household income" for many years when requesting income information from applicants, initially apparently at the direction of examiners from the Office of the Comptroller of the Currency who were concerned about Regulation B compliance. However, the final rule provides that if an issuer requests on its application forms that applicants provide their household income, the issuer is not permitted to rely solely on that income information to satisfy the ability to pay requirements.

Instead, an issuer is required to obtain additional information about the applicant's independent income, for example, by contacting the applicant or using a qualified income estimator. On the other hand, the final rule provides that if an issuer instead requests on its application form that the applicant provide his or her "income" or "salary," without any reference to household income, the issuer is permitted to rely on information submitted on the application and is not required to verify that the income amount provided actually is the personal or independent income of the applicant.

In addressing comments that limiting an issuer's ability to consider household income could prevent a consumer without income or assets from opening an account despite the fact that the consumer has access to (but not an ownership interest in) the income or assets of a spouse or other household member, the FRB responded that it is "unaware of any evidence that card issuers who request 'income' or 'salary' extend less credit to married women who do not work outside the home or to low-income families than issuers that request 'household income.'"

Modeled income. The final rule continues to permit the use of modeled income, or income estimators. The rule provides that an issuer can use "[i]nformation obtained through third parties" and information obtained through "any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income and assets."

PENALTY FEES (SECTION 226.52(B))

The final rule provides a number of clarifications concerning the application of the penalty fee provisions prohibiting the imposition of fees unless the fee is reasonable and proportional to the costs incurred by the issuer or consistent with the applicable safe harbor amounts previously established by the FRB.

Multiple violations during a single billing cycle. The final rule clarifies that an issuer may impose a $35 penalty fee for a subsequent similar violation that occurs during the same billing cycle. After stating that there are few instances where an issuer will be permitted to impose multiple penalty fees in the same cycle, the final rule clarifies that an issuer is permitted to do so under some circumstances. For example, if a consumer made two separate payments that are returned during the same billing cycle, the issuer is permitted to impose a $25 returned payment fee for the first returned payment and a $35 returned payment fee for the second returned payment in that cycle. However, the final rule does not permit an issuer to impose multiple returned payment fees by submitting the same check multiple times.

Waiver of penalty fees. The final rule requires, for purposes of determining the amount of the penalty fee, that an issuer can impose under the safe harbor, that the issuer actually impose the penalty fee and not just have the right to impose such a fee. For example, the rule states that an issuer must actually impose a $25 fee for the first violation in order to subsequently impose a $35 fee for the second violation.

However, the FRB revised the final rule to address concerns that such a requirement would likely discourage issuers from providing beneficial penalty fee waivers because if an issuer voluntarily waives the fee for the first violation, the fee for the second violation could not be greater than $25. In response, the FRB explains that notwithstanding the general requirement that a fee must be imposed for the first violation before the higher safe harbor fee can be imposed, the final rule provides that "[a] fee has been imposed … even if the card issuer waives or rebates all or part of the fee." Thus, under the safe harbor, a card issuer may waive the $25 fee for the initial violation and still impose a $35 fee for a repeated violation of the same type during the same billing cycle or the next six billing cycles; the fee is deemed to have been imposed even if it is waived.

For an issuer opting to waive or rebate a penalty fee, the supplemental information accompanying the final rule provides that an issuer must be able to provide evidence that a lower fee was waived and that the $35 fee was not imposed for the first violation of a particular type. The FRB suggests that one way to demonstrate compliance with the rule is to disclose the imposition of the initial $25 fee and also disclose the waiver of that fee on the consumer's periodic statement.

Over-limit fees for failure to bring balance under credit limit. The final rule clarifies that with respect to multiple violations based on the same event or transaction, an issuer is not prohibited "from imposing fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction," to the extent such fees are otherwise permitted under revised Regulation Z. For example, if a consumer who is over limit in one cycle remains over limit in the next cycle despite making a payment, the issuer may impose a second over-limit fee.

The ability to impose a second late fee in a subsequent cycle. The final rule clarifies that if a consumer misses a payment for a particular billing cycle, in order for an issuer to impose an additional late fee the following cycle, the issuer is required to include the past due payment amount in the minimum payment due on the periodic statement for the following billing cycle and the consumer would have to fail to make that full minimum payment.

On the other hand, if the past due payment amount is not included in the minimum payment due, the issuer is not permitted to impose an additional late fee the following cycle if the consumer pays the minimum payment due as reflected on that periodic statement. This would be true even if the cause of the past due payment is the return of the payment instrument after the cycle date, which precludes the issuer from including the amount in the minimum payment due on the statement. The FRB explains, however, that the issuer could impose a returned payment fee on that account.

Annual fee waivers. The final rule clarifies the prohibition against considering account activity as a factor when, for example, waiving an annual fee. Specifically, the final rule prohibits an issuer from imposing a fee based on inactivity on that account, including a consumer's failure to spend a particular amount or to make a particular type or number of transactions.

To address concerns about circumvention of the prohibition, the FRB revised the rule to prohibit an issuer from imposing an annual fee on all accounts of a particular type but waiving the fee on any account that is used for a certain dollar amount or number of transactions over the course of a year, if the issuer promotes the waiver or rebate of the annual fee. The final rule, however, clarifies that "if the card issuer does not promote the waiver or rebate of the annual fee, … [the final rule] does not prohibit a card issuer from considering account activity along with other factors when deciding whether to waive or rebate annual fees on individual accounts."

TEMPORARY RATE AND FEE EXCEPTION (SECTION 226.9(C) AND SECTION 226.55(B)(1))

As part of the February 2010 rulemaking, revised Regulation Z exempted increases in temporary rates upon the expiration of the temporary reduction period, provided the return to rate and length of the period were properly disclosed prior to the start of that period. However, at that time the FRB expressly declined to include a specific exception for temporary or promotional fee reductions.

Temporary fee reductions. Recognizing that the failure to provide an exception for temporary fee reductions would discourage issuers from offering beneficial fee reductions, the final rule amends Section 226.9(c) and Section 226.55(b)(1) to expressly permit an issuer to impose a fee increase after a similar temporary fee reduction without providing 45 days' advance notice, and without being subject to rate and fee limitations, so long as the issuer provides the consumer, prior to the start of the temporary reduction period, with clear and conspicuous written disclosures of (1) the length of the period and (2) the fee or charge that will apply after the expiration of the period. Thus, the final rule permits an issuer to increase an annual fee after a specified period of time if the issuer provides the consumer with appropriate advance disclosure of this fact.

Six-month requirement. Just like temporary rate reductions, a temporary fee reduction that is subject to Section 226.55, such as an annual fee, must apply to the account for a specified period of six months or longer before an issuer can increase the fee. However, a balance transfer fee or cash advance fee reduction that is not subject to the limitations in Section 226.55 does not have to be offered for a minimum period of six months.

Penalty fee waivers. With respect to penalty fee waivers offered in connection with workout or similar programs, the final rule excludes such waivers from the notice requirements for temporary fee reductions because such waivers are generally an accommodation to the consumer and creditors do not typically market such waivers. However, there is no apparent exclusion for penalty fee waivers that are not offered in connection with workout or similar programs.

Formatting requirements. The final rule clarifies that compliance with the formatting requirements for the account-opening table meets the equal prominence and close proximity formatting requirements for the disclosures required for the temporary rate exception, even if the disclosure of the introductory period is in a smaller font and not in bold type as otherwise required. The FRB said it believes that the account-opening table appropriately and sufficiently conveys key information to consumers. The supplemental information also clarifies that placing the temporary rate information in the tabular disclosure provided in the Schumer box meets the timing, proximity and prominence requirements given an issuer's ability to combine the Schumer box disclosures and the account-opening disclosures.

Furthermore, to allow consumers to take immediate advantage of promotions they believe are beneficial, current Regulation Z permits an issuer to provide the disclosures required for the temporary rate exception orally so long as an issuer later provides the disclosures in writing and then also gives the consumer the right to reject the promotion. Because such promotional offers will never result in a rate increase above the rate temporarily being decreased, the FRB revised the rule to delete as unnecessary the requirement that an issuer provide consumers with the right to reject a temporary rate reduction offer.

SERVICEMEMBERS CIVIL RELIEF ACT EXEMPTIONS (SECTION 226.9(B) AND SECTION 226.55(B)(6))

The final rule expands the Servicemembers Civil Relief Act ("SCRA") exception to cover fees in addition to rates and extends the exception to apply to state SCRAs. Specifically, the final rule clarifies that, once the SCRA no longer applies, an issuer is permitted to increase fees, as well as the rate, to the fees that applied prior to being called to duty.

To complement the expanded SCRA exception, the final rule also amends the right to reject requirements to clarify that the same rule applies when an issuer returns fees to pre-existing levels once a consumer leaves military service and the legal requirements of the SCRA cease to apply. That is, the final rule makes clear that the right to reject does not apply to a fee increase when a fee has been reduced consistent with the SCRA, or other similar federal or state statute or regulation, provided that the increased fee does not exceed the amount of the fee prior to the reduction.

PROMOTIONAL WAIVERS OR REBATES (SECTION 226.55(E))

To address concerns that the revocation of a promotional waiver or rebate program based on a violation of the account terms may be inconsistent with the CARD Act, the FRB used its exception authority to adopt amendments limiting an issuer's ability to revoke such a promotional waiver or rebate offer. Specifically, the final rule provides that a promotional waiver or a rebate of interest, fees or other charges limited by Section 226.55 that is later revoked is considered an increase in a rate, fee or charge for purposes of Section 226.55.

As a result, an issuer is prohibited from increasing the interest charges for existing balances by ceasing or terminating the waiver or rebate, unless the account becomes more than 60 days delinquent. Instead, under such circumstances, an issuer is required to give 45 days' advance notice and the right to reject the change in the waiver or rebate program.

Examples of promotional and non-promotional communications. The final rule is only intended to address a waiver or rebate program that is promoted by an issuer, rather than a waiver or rebate in connection with resolution of a dispute or to address compliance or other concerns. So, the final rule adds a commentary provision clarifying the circumstances under which an issuer will be considered to have promoted a waiver or rebate program.

For purposes of this section, an issuer promotes a waiver if, for example, the issuer:

- Discloses the waiver or rebate in a newspaper, magazine, leaflet, promotional flyer, catalog, sign or point-of-sale display, unless the disclosure relates to charges that have previously been waived; or
- Discloses the waiver or rebate to consumers on or with account statements, unless the disclosure relates to charges that have previously been waived.

An issuer does not promote a waiver if, for example, the issuer:

- Waives a fee when the consumer calls the issuer to dispute a fee that appears on his or her periodic statement;
- Discloses the waiver or rebate made by the issuer on a periodic statement or in a letter, unless the issuer also discloses prospective waivers or rebates in the same communication; and
- Provides benefits, such as rewards points or cash back on purchases that can be applied to the account as credits, "provided that the benefits are not promoted as reducing interest, fees, or other charges subject to § 226.55."

RATE REEVALUATIONS (SECTION 226.59)

Section 226.59(a) provides that if an issuer imposes a rate increase on an account and that rate increase is subject to a 45-day advance notice pursuant to Section 226.9(c) or Section 226.9(g), the issuer must reevaluate the account under Section 226.59 to determine whether the cardholder is eligible for a rate decrease.

Change in the type of rate. To address questions concerning the circumstances under which a change in the type of rate, such as a change from a variable rate to a non-variable rate, would trigger the rate reevaluation requirements under Section 226.59, the final rule clarifies the applicability of the rate reevaluation requirements to such changes. Specifically, the final rule provides that "[a] change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate is not a rate increase for purposes of § 226.59, if the rate in effect immediately prior to the change in type of rate is equal to … the rate in effect immediately after the change."

However, the final rule specifically provides that, under such circumstances, a subsequent increase in a variable rate "constitutes a rate increase for purposes of § 226.59 if the variable rate exceeds the … rate that would have applied if the change in the type of rate had not occurred." Thus, subsequent increases in the actual rate due solely to a change in the applicable index will trigger the rate reevaluation requirements at the time of that rate increase and, therefore, require an issuer to begin periodically conducting reviews of the account.

The FRB rejected requests from the industry to modify the rule to limit subsequent reviews to a single review when the change is based on a change from a non-variable rate to a variable rate, and the only change is an adjustment in an index that is outside of the issuer's control. However, the FRB added a comment to clarify that as part of an issuer's evaluation of the rate increase, an issuer need not consider whether the rate should be converted back to a non-variable rate. That is, while an issuer is expected to review such rate increases on an ongoing basis, Section 226.59 "does not require that the issuer reinstate the same type of rate that applied prior to the change."

Termination of obligation to review. With respect to the amount of a rate reduction required under Section 226.59(a), the section provides that an issuer is to reevaluate rate increases and, based on this review, reduce rates until the particular account is priced where it was before the price increase that gave rise to the obligation to reevaluate. Specifically, Section 226.59(f) provides that the obligation to review rate increases ceases to apply "[i]f the issuer reduces the annual percentage rate applicable to a credit card account … to the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a variable rate determined by the same formula (index and margin) that was used to calculate the rate applicable immediately prior to the increase."

However, the final rule clarifies that an issuer is not required to reduce the rate for a reevaluated account to a rate that is lower than the rate that applied to that account immediately prior to the rate increase. That is, Section 226.59(f), by its own terms, permits an issuer to stop reducing the rate applicable to an account that was previously subject to a rate increase when the rate on that account has been reduced to the rate that applied to that account immediately prior to the rate increase—even if, based on the issuer's new account factors, some new cardholders might qualify for a lower rate under some circumstances.

LIMITATIONS ON UPFRONT FEES (SECTION 226.52(A))

To address concerns about requiring consumers to pay application, processing, or similar fees prior to account opening that, when combined with other fees charged to the account after the account is opened, exceed 25 percent of the account's initial credit limit, the final rule applies the limitation to upfront fees imposed prior to account opening. Specifically, the final rule provides that the 25 percent limitation applies not only to fees charged to an account once it has been opened, but also to fees charged prior to account opening, as well as to fees collected through other sources during the first year the account is open.

For purposes of limitations on fees under Section 226.52(a), the final rule provides that an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. And, the final rule provides that the same timing applies for purposes of the one-year limitation on changing account terms under Section 226.55. However, a footnote in the supplemental information provides that the final rule should not be construed as altering the timing requirements for the provision of the account-opening disclosures, which require an issuer to provide account-opening disclosures before the first transaction is made on the account.

INTERNET POSTING OF CREDIT CARD AGREEMENTS (SECTION 226.58)

The final rule provides guidance on the entity considered to be the issuer for purposes of complying with the requirement in Section 226.58 to post agreements on the Internet. Specifically, solely for the purposes of Section 226.58, the final rule defines a "card issuer" with respect to a particular agreement to be "the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement." The final rule also provides guidance and flexibility with respect to relationships between institutions that partner to issue credit cards or where there are two institutions involved in the issuance of a credit card.

For instance, the final rule clarifies that there may be instances where an issuer is permitted to post agreements on a third-party Web site, such as a retailer partner Web's site, where a customer can access other account information, such as balance information and copies of statements. The final rule also clarifies that an issuer may arrange for a third-party service provider to submit credit card agreements to the FRB on the issuer's behalf, as long as the issuer complies with applicable regulatory guidance concerning the use of a third-party service provider.

The final rule also addresses other questions that have arisen since the February 2010 rulemaking concerning the definition of "pricing information" for purposes of Section 226.58. Based on apparent compliance difficulties and to avoid consumer confusion, the definition of pricing information is amended to exclude variable rate and other information required under Section 226.6(b)(4), such as periodic rates and corresponding annual percentage rates.

In addition, the final rule clarifies that billing rights notices are not deemed to be part of the agreement for purposes of Section 226.58 and, therefore, need not be submitted to the FRB. Furthermore, in order to reduce compliance burdens by allowing issuers to use the same table for compliance with account-opening requirements under Section 226.6(b) and for compliance with the submission of a pricing addendum under Section 226.58, the final rule provides that issuers may, but are not required to, include in the pricing addendum submitted to the FRB other information listed in the account-opening disclosures under Section 226.6(b) provided that such information is complete and accurate as of the date of submission.

EMPLOYEE RATES (SECTION 226.5A AND SECTION 226.6)

The FRB continues to believe that the loss of an employee preferred rate upon termination of employment is akin to the imposition of a penalty rate or the loss of an introductory rate. As a result, the final rule requires an additional disclosure to be included in application and account-opening disclosures for such accounts relating to the loss of an employee preferred rate. Specifically, an issuer is required to disclose beneath the tabular disclosures: 1) the circumstances under which an employee preferred rate would be revoked; 2) the rate that would apply after the employee preferred rate is revoked; and 3) the duration of the rate increase or that the rate increase will apply indefinitely.

A footnote in the supplemental information accompanying the final rule provides that “45 days’ advance notice is required … prior to imposition of the higher rate … [and that] the limitations set forth in § 226.55 apply.” And, these requirements and limitations apply even if the issuer includes the above-described disclosures in its application and account-opening disclosures. The final rule also requires the above-described disclosures for preferential rates offered to non-employees, such as executive officers, directors or principal shareholders.

CHECK DISCLOSURES (SECTION 226.9(B))

The final rule requires an issuer to include certain variable rate disclosures with the disclosures required to be provided with checks that access a credit card account. However, the final rule prohibits an issuer from including the value of the index or the amount of the margin in the tabular disclosures. In addition, the final rule clarifies that an issuer may include in the tabular disclosures terms offered on non-check transactions, such as balance transfers, provided that such transactions are subject to the same terms.

VARIABLE RATES FOR NON-CREDIT CARD ACCOUNTS (SECTION 226.9(C)(2)(V)(C))

The final rule provides that a variable rate plan, even for a non-credit card account, that is subject to a fixed minimum or “floor” does not meet the conditions of the variable rate exception to the 45-day advance notice requirements. Specifically, based on changes the FRB made in the February 2010 rulemaking concerning credit card accounts that were subject to a rate floor or an index that is deemed to be within the issuer’s control, the final rule requires a creditor with a variable rate plan for non-credit card accounts with a rate floor or an index that is deemed to be within the issuer’s control to provide 45 days’ advance notice prior to a rate increase on such a plan.

The supplemental information to the final rule clarifies that “the regulation does not prohibit variable rates that are subject to a minimum or ‘floor,’ but for such rates the creditor must comply with the advance notice requirements.” Because most creditors are unable to make mid-cycle changes, creditors likely would be required to wait 60 or more days before implementing such rate changes, which effectively prohibits such rate floors.

CHANGES TO CLOSED ACCOUNTS (SECTION 226.55(B)(3))

After the first year, the advance notice exception permits an issuer to increase the rate, fee or charge that will apply to new transactions after complying with the appropriate notice requirements. The final rule, however, prohibits an issuer from increasing a rate, fee or charge that is subject to the limitations in Section 226.55 to a closed account or to an account that “the card issuer does not permit the consumer to use … for new transactions.”

In recognition that certain account closures or suspensions are temporary, such as those related to fraud or delinquency, the final rule provides that if an account is closed on a day in which an increased rate, fee or charge would go into effect, “the card issuer may delay application of the increase … until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge.”

CONFORMING VS. NONCONFORMING PAYMENTS (SECTION 226.10(B))

The final rule amends the rules distinguishing between conforming payments, which must be credited as of the date of receipt, and nonconforming payments, which must be credited within five days of receipt. Specifically, the final rule provides that if a creditor promotes a specific payment method, any payment made through that method prior to the cut-off time specified by the creditor (to the extent permitted by the general rule for payments) would be considered a conforming payment.

Also, the FRB has interpreted broadly what constitutes “promoting a payment.” For instance, if a creditor promotes payment by telephone (for example, by including the option to pay by telephone in a menu of options provided to consumers at a toll-fee number disclosed on its periodic statement), payments made by telephone would generally be conforming payments. However, the FRB acknowledged in the supplemental information that “not every payment method made available or disclosed to consumers is ‘promoted.’”

SCOPE OF CARD ACT PROVISIONS (SECTION 226.2(A))

The scope of the CARD Act provisions is encompassed within the definition of a “credit card account under an open-end consumer credit plan.” The final rule clarifies this definition in several ways. The rule clarifies the circumstances under which an account number is considered a credit card; specifically, the phrase “accessed … by an account number” is added to the definition, and final comment 226.2(a)(15)-2 provides examples of credit devices that are and are not considered credit cards for purposes of the CARD Act provisions.

The final rule includes as an example “if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card.” However, “if the account number can also access the line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the Internet), the account number is a credit card” under an open-end plan for purposes of Regulation Z and, therefore, is subject to all of the CARD Act provisions. An account number that is used only for identification or tracking purposes, rather than to access an open-end line of credit, should not be considered a credit card. This change could impact lines of credit established with retailers, as well as other open-end lines of credit to the extent that a consumer can use the account number to make purchases of goods or services, such as over the Internet.

In addition, to address confusion concerning the application of the CARD Act provisions to charge cards, the FRB clarifies that a “credit card account under an open-end consumer credit plan” includes charge cards, except where charge cards are specifically excluded. Accordingly, for example, charge card accounts are subject to the CARD Act provisions relating to the ability to pay. The proposed rule included a reference to prepaid cards suggesting that a prepaid card that accessed a line of credit would be considered a credit card for Regulation Z purposes.

The FRB indicated that this provision was intended to address account numbers, rather than prepaid cards, and has therefore revised the rule to delete the reference to prepaid cards. The supplemental information explains, however, that a prepaid card could be considered a credit card if it falls within the general definition of a credit card.

OTHER REVISIONS AND CLARIFICATIONS

In addition to the substantive revisions discussed above, below is a list of some of the additional revisions that the FRB adopted.

- **Timing for resolving billing errors (Section 226.13(c)).** The rule clarifies that if a consumer received a credit from an issuer and subsequently received a credit from a merchant for the same transaction, the issuer is not prohibited from reversing the amount it had previously credited to avoid the double credit. The reversal of the credit is permissible so long as the total amount of remaining credit is equal to or more than the amount of the error and the consumer does not incur any fee or charge as a result of the reversal.
- **Disclosure of additional limitations in account-opening table (Section 226.5a and Section 226.6).** The rule clarifies that an issuer must not disclose in the Schumer Box or account-opening table any limitations on the imposition of finance charges.
- **Revisions to change-in-terms requirements (Section 226.9(c)).** Under the February 2010 rule, the triggers for providing 45 days' notice were not clear. That is, the definition of a significant change in Section 226.9(c)(2) is inconsistent with the references to Section 226.6(b)(3), (b)(4) and (b)(5). To clarify the advance notice requirements, the rule: 1) amends the definition of a "significant change in account terms" to include variable rate disclosures, as well as other disclosures required under Section 226.6(b)(4); and 2) provides flexibility in how to format the notice of a change required by Section 226.6(b)(4)—if the change does not result in some other significant change, notice is not required to be in table.
- **Limitations on fees related to method of payment (Section 226.10(e)).** The rule provides that a third-party service provider or another third party that collects payments on behalf of an issuer is prohibited from charging a separate fee for that payment, unless the issuer could impose a fee under similar circumstances. However, if a consumer elects to use a third-party service provider, the limitations would not apply because the service provider would not be collecting on the issuer's behalf.
- **Effect of leap year (Section 226.14).** The rule clarifies that a creditor need not take into account any variance in the annual percentage rate that occurs solely by reason of the addition of February 29 in a leap year. Moreover, the rule clarifies that if a creditor uses 366 days, a variance in rate that occurs solely because of the addition of February 29 would not trigger a change in terms notice under Section 226.9(c) or the rate or fee limitations under Section 226.55.

Contact:

L. Richard Fischer
(202) 887-1566
lfischer@mofo.com

Oliver I. Ireland
(202) 778-1614
oireland@mofo.com

Obrea O. Poindexter
(202) 887-8741
opoindexter@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for seven straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.