

Client Alert

September 9, 2014

What's Unfair is Unfair: Repeal of Reg AA May Have Little Practical Effect

By Donald Lampe and Michael Raines

The Federal Reserve Board (Board) issued a [notice of proposed rulemaking](#) on August 22, 2014 (Notice) for the repeal of Regulation AA, which is the Board's credit practices rule prohibiting certain unfair or deceptive acts and practices. The Board issued Regulation AA pursuant to rule writing authority granted to the Board by the Federal Trade Commission Act (FTC Act). Similar to the provisions of the FTC's Credit Practices Rule, Regulation AA prohibits certain provisions and remedies in consumer credit contracts,¹ the requirement of a co-signer without written disclosure of the co-signer's obligations and liabilities, or the pyramiding of late fees. Congress, in enacting the Dodd-Frank Act, repealed the portion of the FTC Act authorizing the Board to issue Regulation AA. The Dodd-Frank Act did not transfer the Board's authority to issue rules under the FTC Act to the CFPB. Thus, Regulation AA, at this point, is a vestige of the pre-Dodd-Frank regulatory framework, but can no longer be used by the Board or the CFPB to regulate unfair or deceptive acts and practices.

The proposed repeal of Regulation AA appears to be a matter of house cleaning. The Board, CFPB, FDIC, NCUA, and OCC (collectively, the Agencies) are not abandoning the authority to regulate the conduct of financial institutions in the spirit of Regulation AA. In a [joint interagency guidance](#) issued simultaneously with the Board's proposal, the Agencies clarified that the repeal of Regulation AA does not permit creditors to engage in the specific conduct prohibited by Regulation AA. The Agencies reminded creditors that the FTC's Credit Practices Rule, which contains rules substantially similar to Regulation AA, can still be enforced by the CFPB against creditors under the CFPB's jurisdiction. Furthermore, the Agencies explicitly state that the Board's supervisory and enforcement authority over unfair or deceptive acts and practices under the FTC Act was not altered by the Dodd-Frank Act. Additionally, the Agencies posited that the same conduct prohibited by Regulation AA may still be considered unfair or deceptive acts and practices under the Dodd-Frank Act. The Agencies declared that they may bring enforcement actions against creditors who engage in conduct previously prohibited by Regulation AA, despite the absence of a specific regulation governing the conduct.

Regulation AA will be removed from the Code of Federal Regulations, but the Board and other federal regulators have made it clear that the mere repeal of Regulation AA does not permit the conduct prohibited by the regulation. Will these actions by banking regulators further muddy the waters surrounding unfair, deceptive, and abusive practices? Stay tuned for future developments in UDAP as interpreted by the banking agencies and UDAAP as applied by the CFPB.

¹ Regulation AA prohibits consumer credit contracts containing clauses that (1) confess judgment or waive the right to a hearing; (2) waive state exemptions concerning the attachment of debt to personal residences; (3) assign future wages in the event of default; or (4) grant non-possessory security interests in household goods not purchased with the applicable credit.

Client Alert

Contact:

Donald Lampe*

(202) 887-1524

dlampe@mofo.com

Michael Raines

(202) 887-1680

mraines@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. 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 11 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. Prior results do not guarantee a similar outcome.

* Not admitted in the District of Columbia; limited to federal practice; admitted only in North Carolina.