

CREDIT CARD ACT OF 2009

Presented by:

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About Our Speakers

L. Richard Fischer is a partner of Morrison & Foerster and practices in the firm's Washington, D.C. office. He advises financial institutions, retailers and other companies across the United States on payment system and retail banking issues, with special emphasis on credit card, e-commerce, privacy and technology issues.

Mr. Fischer is the author of a recognized treatise on privacy and information practices entitled *The Law of Financial Privacy* (3rd ed.). Mr. Fischer has been named one of Washington's top banking and privacy lawyers by the *Washingtonian* magazine and is nationally recognized in both fields.

About Our Speakers

Obrea O. Poindexter is Of Counsel in the Washington, D.C. office of Morrison & Foerster. Ms. Poindexter's practice focuses on financial services law. Her practice includes advising clients on: consumer lending issues under the Truth in Lending Act and the Equal Credit Opportunity Act; electronic banking and payment system issues under the Electronic Fund Transfer Act (Regulation E); and the E-SIGN Act and other issues.

Prior to joining Morrison & Foerster, Ms. Poindexter was a staff attorney for five years at the Board of Governors of the Federal Reserve System in the Division of Consumer and Community Affairs, where she focused on issues relating to electronic banking, and consumer lending and leasing.

Effective Dates and Rule Writing

- Some sections are effective August 20, 2009
 - 45-day notice of rate increases and other “significant changes”
 - Right to cancel
 - Minimum 21-day billing periods
- Most sections are effective February 22, 2010
 - Retroactive rate increases and protected balances
 - Payment allocation requirement
 - New statement disclosures
- Some sections are effective August 22, 2010
 - Reasonable penalty fees
 - Interest rate reductions
 - Gift card restrictions

Effective Dates and Rule Writing

- The Federal Reserve Board must write at least three sets of rules
 - Some in consultation with other Agencies
 - Banking Agencies for some provisions
 - The FTC for others
 - Some rules will seek public comment and some will not
- Impact of 90-day provisions still not clear
- Impact on recent Regulation Z Rule still not clear
 - Timing – still July 1, 2010?
 - Content – how will it mesh with the new Act?

Notice of Rate Increase and Significant Changes

Section 101(a)

- The Act prohibits an issuer from increasing the APR on a credit card account unless the issuer has provided the consumer with a 45-day advance written notice of the rate increase
- This requirement is effective August 20, 2009
- There are three exceptions to this notice requirement:
 1. Expiration of time – with proper disclosure of the time period and “go to” rate
 2. Variable rate – publicly available and beyond issuer’s control
 3. Workout or temporary hardship arrangement – with proper disclosure of purpose, time frame and “return to rate”

Notice of Rate Increase and Significant Changes

Section 101(a)

- 90-Day Implementation and Compliance Issues:
 - Reconciling effective date with the issuer's billing cycles
 - Implementation of any changes in terms prior to effective date
 - Impact on existing penalty pricing provisions
 - Determination of need to change existing cardholder agreements

Notice of Rate Increase and Significant Changes

Section 101(a)

- Issuer also must send 45-day advance written notice if there is another “significant change” to the account agreement
- A “significant change” includes an increase in a fee or finance charge in addition to an increase in the APR
- The Act requires the Federal Reserve Board to write rules on what constitutes a “significant change”
- This requirement also is effective August 20, 2009
- So time is short and rule writing is critical

Notice of Rate Increase and Significant Changes

Section 101(a)

- 90-Day Implementation and Compliance Issues:
 - Will Federal Reserve Board limit “significant changes” to terms Regulation Z requires included in a tabular format at solicitation or account opening?
 - Broader definition could result in more notices, but less meaningful notices
 - Narrower definition could provide some cost and compliance relief

Right to Cancel

Section 101(a)

- Every 45-day written notice must include a statement of the consumer's right to cancel the account before the effective date of the rate increase or other significant change
- The issuer is prohibited from treating cancellation of the account as a default; so the issuer may not:
 - Require the consumer to repay the obligation in full
 - Use a method that is less beneficial to the consumer than one of the methods used for repaying an "outstanding balance"
 - Impose a penalty or fee for the cancellation
- What impact on existing penalty pricing terms?
- What impact on closed accounts?

Limits on Retroactive Pricing Increases

Section 101(b)

- The Act prohibits an issuer from increasing the rate, fee or finance charge on the existing balance of a credit card account unless one of four exceptions applies
- The restriction on retroactive increases is effective in February 2010
- The restriction goes beyond UDAP Rule to prohibit retroactive increases in fees and finance charges
- What is the relationship to 45-day notice requirement effective on August 20?

Exceptions to Limits on Pricing Increases

Section 101(b)

- There are four exceptions to the prohibition on retroactive pricing increases:
 1. Expiration of time – with proper disclosure of time period and “go to” rate
 2. Variable rate – publicly available and beyond issuer’s control
 3. Workout or temporary hardship arrangement – with proper disclosure of purpose, time frame and “return to rate”
 4. 60-day delinquency in making minimum payment – with proper disclosure and right to cure

Exceptions to Limits on Pricing Increases

Section 101(b)

Exception 1: Expiration of Time

- A rate may be increased at the expiration of a specified period of time if:
 - Prior to the beginning of that period, the issuer discloses, in a clear and conspicuous manner, both the length of the period and the rate that will apply at expiration of the period
 - The increased rate does not exceed the previously disclosed rate and
 - The increased rate is not applied to transactions that occurred prior to the beginning of the reduced rate period
 - What impact on employee rates?
 - What impact on relationship rates?
 - Can the Federal Reserve Board clarify away this limitation?

Exceptions to Limits on Pricing Increases

Section 101(b)

Exception 2: Variable Rate

- A variable rate may be increased, if the rate is based on an index that is:
 - Not under the control of the issuer
 - Available to the public
- Issuer will be restricted in its ability to change a non-variable rate to a variable rate
 - Could require ongoing use of both fixed and variable rates for the same account
 - Could cause complex payment allocation issues

Exceptions to Limits on Pricing Increases

Section 101(b)

Exception 3: Workout – Temporary Hardship Arrangement

- A rate, fee or finance charge can be increased upon the consumer's completion, or failure to comply with the terms, of a workout or temporary hardship arrangement
- Provided that:
 - The new rate, fee or finance charge does not exceed the rate, fee or finance charge that applied to that category of transactions prior to commencement of the arrangement and
 - The terms of the arrangement, including any increase due to the completion or failure to comply with the arrangement, are properly disclosed to the consumer before the start of the arrangement
- So clear disclosure becomes condition of ability to increase rate, fee or finance charge

Exceptions to Limits on Pricing Increases

Section 101(b)

Exception 4: 60-Day Delinquency

- A rate, fee or finance charge may be increased if the consumer has not made a minimum payment within 60 days
- But only if:
 - The issuer has provided the 45-day advance notice required by Section 101(a)
 - The issuer has provided a clear and conspicuous written statement of the reason for the increase and
 - The consumer is given the right to cure (or reduce the rate, fee or finance charge) no later than six months after the date on which the increase is imposed, if the consumer makes the required minimum payments on time during that six-month period

Exceptions to Limits on Pricing Increases

Section 101(b)

- **Implementation and Compliance Issues:**
 - Similar to the UDAP Rule, dual notice of anticipatory repricing should be permitted
 - Prospective application of repricing if payment is received within 60 days
 - Retroactive application of repricing if payment is not received within 60 days
 - Disclosure and application of right to cure and return to prior rate, fee or finance charge

Interest Rate Reduction Section 101(c)

- The Act requires an issuer who increases the rate on a credit card account based on risk factors to consider changes in “such factors” when subsequently determining whether to reduce the rate on that account
- The Act expressly states that this section should not be construed to require a reduction in any specific amount
- This provision becomes effective in August of 2010
- The Federal Reserve Board must write rules by February of 2010

Interest Rate Reduction Section 101(c)

- Specifically, the issuer must:
 - Maintain reasonable methodologies for assessing risk factors
 - Review, every six months, any account where the rate has been increased for risk since January 1, 2009
 - Assess whether the risk factors have changed, including whether the risk has declined
 - Reduce the rate when a reduction is indicated by the review
 - If a rate is increased, the issuer must provide the 45-day notice, including the reason for the rate increase
- Does the reference to “such factors” limit the issuer’s ability to modify its risk models?

Limitations on Initial and Promotional Rates and Fees

Section 101(d)

- An increase in a rate, fee or finance charge on a credit card account may not be effective before the end of the first year after the account is opened
 - But the four exceptions described above can apply
- An issuer may not increase a promotional rate within six months after the date the promotional rate takes effect
 - But this limitation is subject to such reasonable exceptions as the Federal Reserve Board may establish by rule
- These limitations should not apply until February of 2010

Limits on Fees and Interest Charges

Section 102

- *Prohibition of Penalties for On-Time Payments*
 - The Act prohibits double-cycle billing
 - This prohibition does not apply to:
 - A finance charge adjustment resulting from the resolution of a dispute or
 - A return of a payment for insufficient funds
 - Availability of partial grace period
 - The Act requires issuers offering a grace period to provide a grace period for partial payments
 - The extent of this requirement is not clear
 - The Act does not require an issuer to offer a grace period

Limits on Fees and Interest Charges

Section 102

- *Opt In Required for Imposition of Over-the-Limit Fees*
 - The Act prohibits an issuer from charging an over-the-limit fee when a consumer exceeds the authorized credit limit, unless the consumer opts in before that transaction
 - Before opting in, the consumer must receive a notice disclosing the over-the-limit fee
 - If a consumer opts in and a fee is imposed, the issuer must notify the consumer of the consumer's right to rescind the opt in
 - This right to cancel the opt in is given on the statement that includes the over-the-limit fee
 - The Act provides flexibility on the timing and method of the opt in
 - This provision becomes effective in February of 2010

Limits on Fees and Interest Charges

Section 102

- *Limitations on Over-the-Limit Fees*
 - An issuer may impose an over-the-limit fee on an account only once during a billing cycle
 - An over-the-limit fee may be imposed only once during each of the two subsequent billing cycles unless the consumer has:
 - Obtained an additional extension of credit in excess of the credit limit during a subsequent billing cycle or
 - Reduced the outstanding balance below the credit limit as of the end of the billing cycle

Limits on Fees and Interest Charges

Section 102

- *Limits on Fees Related to Method of Payment*
 - The Act prohibits an issuer from imposing a separate fee when a consumer makes a payment on the account, whether that payment is made by mail, electronic transfer, telephone authorization or other means
 - The Act expressly exempts from this prohibition a payment that involves an expedited service initiated by an actual representative of the issuer
 - This provision becomes effective in February of 2010

Limits on Fees and Interest Charges

Section 102

- *Reasonable Penalty Fees*
 - The Act prohibits an issuer from imposing a penalty fee or charge in connection with any omission or violation of the agreement unless the fee is “reasonable and proportional” to the omission or violation
 - This restriction applies to any late payment, over-the-limit or other penalty fee
 - The Federal Reserve Board is required to establish standards for assessing this requirement by considering:
 - The costs incurred
 - The deterrence value of the fee
 - The conduct of the cardholder
 - Such other factors as are deemed appropriate
 - This provision becomes effective in August of 2010

Application of Card Payments

Section 104

- *Timely Receipt of Payments*
 - The Act prohibits an issuer from imposing a finance charge on a consumer's account if the issuer receives the consumer's payment in an identifiable form by 5:00 p.m. on the date the payment is due
 - This requirement likely will apply to all open-end credit accounts
 - This provision becomes effective in February of 2010

Application of Card Payments

Section 104

- *Application of Payments*

- The Act requires an issuer to apply any amount paid in excess of the minimum payment:
 - First to the card balance subject to the highest rate of interest
 - Then to each successive balance subject to the next highest rate of interest, until the payment is exhausted
- This provision becomes effective in February of 2010

Application of Card Payments

Section 104

- The Act has a special requirement for deferred interest arrangements:
 - The issuer must apply the entire amount in excess of the minimum payment to the deferred interest balance during the last two billing cycles immediately preceding the expiration of the period during which interest is deferred
 - This provision becomes effective in February of 2010
- Proposed Regulation Z disclosures
 - Periodic statement
 - Advertising

Due Dates

Section 106

- *Due Dates for Credit Card Accounts*
 - The Act requires the payment due date for a credit card account to be the same calendar day each month
 - If the payment due date is on a day on which the issuer does not receive or accept payments by mail (including weekends and holidays), the issuer may not treat a payment received on the next business day as late for any purpose
 - This provision becomes effective in February of 2010

Timing of Payments

Section 106

- *Time to Make Payments*
 - The Act prohibits an issuer from treating a payment on an account as late for any purpose, unless the issuer has adopted reasonable procedures designed to ensure that each periodic statement is mailed or delivered to the consumer no later than 21 days before the due date
 - The statement must include the information required by TILA Section 127(b)
 - This requirement also applies to the grace period
 - The requirement likely will apply to all open-end credit accounts including home equity lines of credit
 - This requirement lacks the flexibility provided in the UDAP Rule
 - This provision becomes effective in August of 2009

Consideration of Ability to Repay

Section 109

- The Act prohibits an issuer from:
 - Opening a credit card account for a consumer or
 - Increasing the credit limit of a consumer's existing account
- Unless the issuer has considered the ability of the consumer to make the required payments under the terms of the account
- The prohibition could complicate the opening of co-branded accounts at the point of sale
- This provision amends Chapter 3 of TILA and should have no private right of action
- This provision becomes effective in February of 2010

Renewal Disclosures

Section 203

- If an issuer has changed any term of the account agreement since the last renewal without disclosing that change to the consumer, the issuer must provide the consumer with a renewal disclosure at least 30 days prior to the scheduled renewal date of the account
- This provision becomes effective in February of 2010
- What does “any term” mean?

Internet Posting of Credit Card Agreements

Section 204

- Each issuer must maintain a Web site on which it makes available the account agreements for each card account offered by the issuer
- The issuer also must electronically provide the Federal Reserve Board with a copy of every account agreement posted on its Web site
- The Federal Reserve Board must maintain a Web site as the central repository of all card agreements received from issuers
- The account agreements must be easily accessible and retrievable by the public
- The Act expressly exempts agreements that contain individually negotiated changes or modified workouts
- This provision becomes effective in February of 2010

Extension of Credit to Underage Consumers

Section 301

- An issuer is prohibited from issuing a card to a consumer who is younger than 21, unless the issuer obtains a written application from the consumer
- The application must include either:
 - The signature of a cosigner who is at least 21 who has the means to repay the debts incurred by the young consumer and who will be jointly liable for debts incurred in connection with the account before the consumer reaches the age of 21 or
 - Financial information showing that the young consumer has independent means of repaying debts incurred in connection with the account
 - This provision becomes effective in February of 2010

Extension of Credit to Underage Consumers

Section 301

- This section creates significant operational issues if it is applied to existing accounts
- In particular, clarity from the Federal Reserve Board is needed on application of the section to:
 - Replacement cards
 - Renewal cards
 - The addition of a new cardholder

Increasing the Credit Limit

Section 303

- The Act limits the ability of an issuer to increase the credit limit on a credit card account with a young cardholder
- The limitation applies where a parent, legal guardian or spouse of the consumer, or any other individual, has assumed joint liability for the debt incurred by the consumer
- The issuer cannot increase the credit limit before the consumer reaches the age of 21, unless the parent, guardian, spouse or other person approves the increase in writing and assumes joint liability for the increase
- This provision becomes effective in February of 2010

Gift Cards

Section 401

- The Act amends the Electronic Fund Transfer Act (“EFTA”) to prohibit a creditor from imposing a dormancy fee, inactivity charge or fee, or a service fee on a gift certificate, store gift card or general-use prepaid card, unless:
 - There has been no activity on the account in the 12-month period ending on the date the charge or fee is imposed
 - Certain required disclosures have been given
 - Only one fee is charged in any given month and
 - Any additional requirements established by the Federal Reserve Board have been met
- These rules on gift cards become effective in August of 2010

Gift Cards – Definition

Section 401

- The Act excludes from the requirements of this section an electronic promise, plastic card, or payment code or device that is:
 - Used solely for telephone services
 - Reloadable and not marketed or labeled as a gift card or gift certificate (such as a payroll card or a government benefits card)
 - A loyalty, award or promotional gift card, as defined by the Federal Reserve Board
 - Not marketed to the general public
 - Issued in paper form only (including for tickets and events) or
 - Redeemable solely for admission to an event or location, including services or goods obtained at the event or in conjunction with admission to the event

Gift Cards – Disclosures

Section 401

- The disclosures required by this section include:
 - A statement that a dormancy fee, inactivity charge or fee, or service fee may be charged
 - The amount of that fee or charge
 - How often the fee or charge may be assessed and
 - That the fee or charge may be assessed for inactivity
- Clarification is needed on whether the disclosure must be on the card or with the card

Gift Cards

Section 401

- The issuer must inform the consumer of the charge or fee before the gift card is purchased
- The notice requirement applies regardless of whether the gift card is purchased in person, over the Internet or by telephone
- The requirements do not apply to a gift card distributed under an award, loyalty or promotional program, as defined by the Federal Reserve Board, or where there is no money or other value exchanged

Gift Cards

Section 401

- The Act also prohibits the sale of a “gift card” with an expiration date, unless:
 - The expiration date is not earlier than five years after:
 - The date on which the gift card was issued or
 - The date on which funds were last loaded to the gift card
 - The terms of expiration must be clearly and conspicuously stated

Gift Cards – Federal Reserve Board Rule Writing

Section 401

- The Act requires the Federal Reserve Board to write rules implementing the gift card requirements
- The rules are to specify additional requirements as appropriate relating to
 - The amount of dormancy fees, inactivity charges or fees, or service fees that may be assessed and
 - The amount of remaining value of the gift card below which such charge or fee may be assessed
- The Federal Reserve Board also is directed to determine the extent to which the individual definitions and provisions of the EFTA or Regulation E should apply to gift cards
- The Federal Reserve Board is directed to consult with the FTC in prescribing these rules
- The rules are to be issued in final form by February of 2010

Gift Cards – State Law

Section 402

- The Act amends the EFTA's section relating to state laws to include dormancy fees, inactivity charges or fees, service fees or expiration dates of gift cards
- Under this section inconsistent state laws are preempted, but a state law providing greater protection is not considered inconsistent for purposes of EFTA preemption